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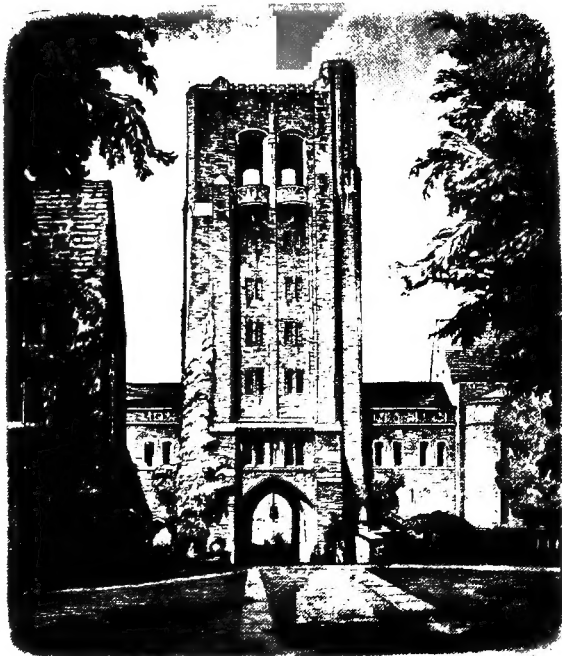
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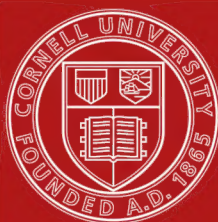


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DIGEST
OF
FIRE INSURANCE DECISIONS

IN THE
COURTS OF GREAT BRITAIN AND
NORTH AMERICA.

BY
H. A. LITTLETON AND J. S. BLATCHLEY.

SECOND EDITION,
REVISED AND ENLARGED.

BY STEPHEN G. CLARKE,
COUNSELLOR AT LAW.

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PREFACE TO THE FIRST EDITION.

THE present work is designed to embrace a digest of all the decisions on the subject of insurance against fire, pronounced in the Courts of Great Britain and North America, from the earliest times down to the latest reports. We have examined 2,576 volumes, and have attempted to give abstracts of 930 cases, which are embodied in 1,525 sections; and we have read every case cited. The volumes examined, are indicated in the table of reports, and the cases examined, in the table of cases. We have attempted to make the digest complete only so far as regards fire insurance. That still more bulky division of the law which embraces Marine and Life Insurance, we have not attempted to do anything with, though a few cases, which properly belong to that division, have crept into this work. We have appended to each section the date of the decision, which may be found useful in studying the conflicts and fluctuations of judicial opinion on some branches of the law; and we attempted to arrange the sections under the several headings in chronological order, but, on account of practical difficulties in the preparation of the work, have not been able in every instance to adhere to that arrangement.

We are acquainted with no other work the design of which is to give the entire body of judicial decisions on this branch of the law, and we have had nothing by which to test the completeness of our lists. In examining for

cases we have been compelled to rely on the indices and tables of cases in the reports, and these we have not found to be entirely reliable, as indicating all the cases on insurance which they contain. From this cause, as well as because of mistakes and oversights which may have been committed by ourselves, cases which ought to be embraced may have been overlooked. We have, however, used all the means in our power for discovering the cases, and believe that few will be found to have eluded our search. We shall be happy to be advised of any omissions or mistakes which may be discovered.

In the preparation of both the body of the work and the index, we have kept constantly in mind the wants and habits of thought of agents, officers of insurance companies and others, practically engaged in the business of insurance, as well as of the legal profession; and the work has not been entirely arranged as it would have been, had we designed it for the latter class alone.

Probably no one will become more thoroughly aware of the imperfections of the work than ourselves. Such as it is, however, we submit it to the public, in the hope that the long and wearisome labor it has cost us, may be saved in some corresponding degree to those who shall use it.

Our thanks are due to many reporters and publishers for permission to use their head notes, and also to John L. Harvey, of the Dubuque Bar, for assistance in the preparation of the work.

DUBUQUE, 1862.

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PREFACE TO THE SECOND EDITION.

IN preparing this edition of a book so favorably known, I have in no respect ventured to change the plan of the original work. My aim has been to make it as complete as possible to the present time; and to this end I have carefully examined every volume of reports published in this country or Great Britain since the former edition appeared, and also a few volumes of prior date accidentally omitted from that edition. The present volume contains an abstract of 1,246 cases embodied in 2,216 sections, being an increase of 316 cases and 691 sections over the former edition. As the value of a work like the present depends greatly upon the readiness with which a case in point may be found, I have taken great pains to make the index and the cross references at the end of each title both full and accurate.

The growing importance of the interests protected by insurances against fire, and the necessity of a collection of the adjudged cases upon that branch of the law, is well illustrated by the increase of matter in the present edition. If it shall be found of use in lightening the labors of those who may be called upon to consider the many and perplexing questions arising upon contracts of insurance, I shall feel that my labor will not have been without reward.

STEPHEN G. CLARKE.

NEW YORK, Sept. 1868.

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AGENT.

§ 1. An action lies against one who voluntarily, though without compensation, undertakes to obtain insurance for another, but proceeds so negligently and unskillfully that the policy is worthless. *Wilkinson v. Coverdale*, 1 Esp. 75. 1793.

§ 2. If a merchant is in the habit of effecting insurances for his correspondent, and is directed to make an insurance and neglects to do so, he is himself answerable for the losses as insurer, and is entitled to a premium as such. *Morris v. Summerl*, 2 Wash. C. C. U. S. 203. 1808.

Note to this case says it was affirmed in Sup. Ct. U. S., Feb'y. 1809.

§ 3. Where the act of incorporation of a mutual company, provided, "that all policies should be signed by the president and secretary," and the "president, with one-third of the directors, shall constitute a quorum for the transaction of business," and the president alone waived the sufficiency of preliminary proof, required by the conditions of the policy; *Held*, that the president, as such, had no power to waive any conditions of the policy when not authorized by the directors. *Dawes v. North River Ins. Co.* 7 Cow. N. Y. 462. 1827.

§ 4. The president of an insurance company, as such, has no power to dispense with the conditions of a policy. *McEvers v. Lawrence*, 1 Hoffman, Ch. N. Y. 172. 1839.

§ 5. Plaintiff consigned books to defendant, and instructed him to have them insured, which defendant failed to do, and they were destroyed by fire; *Held*, that plaintiff was entitled to recover of defendant the full value of the books, in the absence of any evidence of a custom regulating the amount of damages in such cases, or of any rule among insurers to insure only a certain proportion of the value. *Ela v. French*, 11 N. H. 356. 1840.

§ 6. An executor is not liable for not keeping up the insurance on his testator's property. *Baily v. Gould*, 4 Young & Collyer, 221. 1840. *Fry v. Fry*, 27 Beav. 146. 1859.

§ 7. Where an agent, entrusted with blank policies, and authorized to effect insurances "for a particular city and its vicinity," insured property in another city 100 miles distant where the company had another agent with similar authority for "that city and vicinity;" *Held*, that the company was bound by such policy, as he was a general agent of the company and acting within the scope of his authority; and that the company could not discharge themselves by setting up their private instructions to such agent when they were wholly unknown to the plaintiff at time of entering into the contract. *Lightbody v. North American Ins. Co.* 23 Wend. N. Y. 18. 1840.

§ 8. Where premium was paid on the 30th March and receipt given, and fire took place next day, and policy was delivered on the 21st day of April following by the agent, which was after the insurance company had refused to pay the loss and had told assured that they had revoked the authority of the agent, though the letter of revocation was not written till the 22d and was not received by the agent until the 23d day of April; the delivery bound the company. *Lightbody v. North American Ins. Co.* 23 Wend. N. Y. 18. 1840.

§ 9. Where an agent, entrusted with blank policies

and authorized to effect insurances, insured a special risk, contrary to the instructions of the office; *Held*, that nevertheless the company were bound by it, as assured had not been made cognizant of the private instructions of the company to the agent. *Lightbody v. North American Ins. Co.* 23 Wend. N. Y. 18. 1840.

§ 10. Where there is no evidence of the written appointment of an agent, the jury must decide on the fact and the extent of his agency by what he testifies and did, coupled with the acts of the defendants recognizing him. *Nicol v. American Ins. Co.* 3 Wood & Min. C. C. U. S. 529. 1847.

§ 11. If either party must suffer by the mistake of the agent, it must be the party whose agent he is. *Nicol v. American Ins. Co.* 3 Wood. & Min. C. C. U. S. 529. 1847.

§ 12. Where an assignment of the interest of the assured, "unless by consent of the company manifested in writing," was prohibited by the policy, and the secretary, on application to him, endorsed upon the policy a consent to an assignment of the policy; it seems that his authority to do so, in the absence of evidence to the contrary, should be presumed. But if it were necessary to prove his authority, a formal resolution of the board of directors need not be shown. Evidence that the secretary, he being the sole agent of the company in transacting business at their office, has been in the uniform habit of giving such consent in writing, and making regular entries of his acts in the books of the company, without any objection or repudiation on the part of the company, is enough at least to carry the question of authority to the jury. *Conover v. Mutual Ins. Co.* 3 Denio N. Y. 254. 1846. Affirmed 1 Comst. N. Y. 290. 1848.

§ 13. Where a by-law of a mutual insurance company empowered "the president, vice-president, or either of

them, to make contracts for the corporation, to transact all its ordinary business, and to perform whatever belongs to the executive department," the president may transfer a premium note in advance. *Howland v. Meyer*, 3 Comst. N. Y. 290. 1850.

§ 14. Although an agent, who is only authorized to receive and forward applications, has full knowledge of material facts, not disclosed by the assured in an application for life insurance, yet his knowledge cannot be chargeable to the insurance company. *Vose v. Eagle Life & Health Ins. Co.* 6 Cush. Mass. 42. 1850.

§ 15. Where a by-law in a policy of insurance declared that the agent taking the application should be deemed the agent of the applicant; *Held*, that such by-law did not divest the agent of his attributes as agent of the company when in their employ, soliciting risks of insurance and making applications. *Masters v. Madison Mut. Ins. Co.* 11 Barb. N. Y. 624. 1851.

§ 16. Where the charter gave to the directors the power of assenting to assignments, and the secretary alone consented to an assignment of a policy; *Held*, that after entering it upon the books, subject to the inspection of the directors, without any disapproval being manifested on their part, the act was binding on the company. *Durrar v. Hudson County Mut. Ins. Co.* 4 Zab. N. J. 171. 1853.

§ 17. An agent of two insurance companies, having taken a risk in one company on the 18th Nov. re-insured it in his other company on the 22d Nov. making policy to himself as agent, and, before approval or rejection by the company, the insured property was lost; *Held*, that, as he was agent for both parties, the contract was invalid. *Utica Ins. Co. v. Toledo Ins. Co.* 17 Barb. N. Y. 132. 1853.

§ 18. One appointed agent and surveyor of an insurance company and authorized to take applications, and receive the cash percentage thereon, giving certificates of such receipts, the money to be refunded in case of non-approval by the directors, is not thereby authorized to make contracts for insurance. *Insurance Co. v. Johnson*, 23 Penn. St. 72. 1854.

§ 19. The president and secretary of an insurance company are the proper officers to whom the preliminary proofs of loss are to be presented, and if, after the loss, and when notice of it is given, they promptly admit that they had agreed to insure the property, or to keep it insured, it is a statement made in the course of their duties, and binds the company, as much as their certificate of premium paid and of a renewal would bind the company. *Trustees 1st Baptist Church, Brooklyn, v. Brooklyn Fire Ins. Co.* 18 Barb. N. Y. 69. 1854.

§ 20. An agent of an insurance company for issuing policies in their behalf, being also the agent of another company, reinsured the plaintiffs, with defendants; *Held*, that having acted within the general scope of his authority in making this contract of insurance, he clearly bound the defendants, notwithstanding he departed from his instructions; unless the plaintiffs had notice that he was exceeding his authority. *Held*, further, that the mere fact of the agent being also the secretary of the plaintiffs, was not to be regarded as notice to the plaintiffs, that he was exceeding his instructions. *New York Central Ins. Co. v. National Protection Ins. Co.* 20 Barb. N. Y. 468. 1854. *Reversed*, 4 Kern. N. Y. 85. 1856.

§ 21. If in drawing up an application, the agent act as the agent of the company, and neglects to incorporate in it, facts which were essential to the validity of the policy, when he had promised the applicant so to do, the company would be estopped to set up the omission, for the purpose of defeating an action brought on the policy. *Kelly v. Troy Fire Ins. Co.* 3 Wis. 254. 1854.

§ 22. Where the by-laws annexed to a policy of insurance provide that it is the duty of the secretary of the company "to answer all communications in behalf of the company," admissions of the secretary made in such correspondence, as to the time and sufficiency of a notice of a loss, bind the company. *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 20. 1855.

§ 23. The agents were furnished with blank policies, which were to be filled up, endorsed and issued at their discretion; and their power, as to the rate of premium, the amount of the risk, and the nature of it, was unlimited. The policy in this case was filled up and countersigned by the agents on the 14th of October, but was not delivered, nor was the premium paid until the 8th of December following, when on demand of the assured, a memorandum was endorsed on the policy materially changing the risk; *Held*, that these agents being clothed with general powers as to filling up and issuing policies, and having authority to make an original contract of insurance with terms similar to those found in this policy, had authority, before the delivery of the policy, to enlarge from its first draft by a change or modification of the description of the property insured, so as to embrace the case of a building unfinished, but then in process of construction; and that, the omission of the agents to communicate the change made to their principal, did not affect the liability of the company on the policy. *Gloucester Manf. Co. v. Howard Fire Ins. Co.* 5 Gray, Mass. 497. 1855.

§ 24. Where the affairs of a corporation are managed by a board of directors, they are the agents of the corporation, and their acts are binding on it, when they act within the scope of their authority, however that authority may be conferred. *Goodwin v. United States Annuity & Life Ins. Co.* 24 Conn. 591. 1856.

§ 25. An insurance company is not liable for rent of office leased by an agent where the latter was only au-

thorized to effect insurances and to sell shares of stock of the company for a certain per cent. commission. *Brander v. Columbia Ins. Co.* 2 Grant, Pa. 470. 1856.

§ 26. Where an agent, by a written appointment, was declared to be "regularly appointed as agent and surveyor of the company," and to be "duly authorized to take applications for insurance;" *Held*, that after the completion and delivery of a policy, such agent had no authority to endorse on said policy an approval of a subsequent insurance, as that authority was not included in the written appointment. *Wilson v. Genessee Mut. Ins. Co.* 4 Kern. N. Y. 418. 1856. Reversing 16 Barb. N. Y. 511. 1853.

§ 27. One member of a partnership, who are agents, has all powers of firm to make parol contracts of insurance. *Kennebec Co. v. Augusta Ins. & Banking Co.* 6 Gray, Mass. 204. 1856.

§ 28. If one authorized to receive and forward applications, and instructed by the company to consider himself the agent of the applicant, neglects to communicate material facts to the company, which have been made known to him by the applicant, and the company issues a policy in ignorance of such facts, the neglect of such agent is not chargeable to the applicant, nor does the instruction of the company to consider himself as the agent of the insured, make him such, unless the insured choose to recognize him as his agent. *Beebe v. Hartford Mut. Ins. Co.* 25 Conn. 51. 1856.

§ 29. Where by agreement between consignor and consignee, or where the custom and usage of the place requires the consignee to insure the goods, the consignee will be held liable for their loss or damage by fire, although he had effected no insurance upon them. *Elliot v. Ryan*, 6 Lower Canada, Q. B. Appeal side, 87. 1856.

§ 30. An agent to receive and forward applications, without authority to issue policies, is the agent of the insured, for whose mistakes of fact committed in the statements in the application, the insured is responsible. But if the agent send a different application than that directed to be sent by the assured, the company is responsible, however inaccurate such application may be. *Wilson v. Conway Ins. Co.* 4 R. I. 141. 1856.

§ 31. An agent appointed to receive and forward applications, receive and receipt for the premiums, and return policies to the assured, has no authority to bind the company to issue a policy. *Chase v. Hamilton Mut. Ins. Co.* 22 Barb. N. Y. 527. 1856.

§ 32. Where an agent of one company was, unknown to that company, also the secretary of another, and reinsured the company, of which he was the secretary, in the company of which he was the agent; *Held*, that the policy was made under circumstances which would enable the company, of which he was the agent, to avoid it, upon the principles of equity—and as it was sought to be enforced in a Court where these principles were among the grounds of decision, the contract must be held invalid. *New York Central Ins. Co. v. National Protection Ins. Co.* 4 Kern. N. Y. 85. 1856.

§ 33. Where a company received an application for insurance from P. and issued a policy thereupon, and subsequently appointed P. their agent, taking from him a bond dated prior to the insurance; *Held*, that the company must be regarded as intending to ratify P.'s agency in the transaction. *Farmers' Mut. Fire Ins. Co. v. Marshall*, 29 Vt. 23. 1856.

§ 34. The defendants, the factors of the plaintiff, effected insurance on their stock of tobacco, and other merchandise, in four different companies. Some of the policies were for six months, others for a year, and at

different rates. The rate of insurance was equal to $\frac{1}{8}$ of one per cent. per month. The plaintiff in the accounts rendered of sales of tobacco, was charged $\frac{1}{4}$ of one per cent. per month for the insurance. *Held*, that the defendants were not to be considered as the plaintiff's agents in the insurances they had effected, but were to be considered as being themselves the insurers of the plaintiff at the rate of $\frac{1}{4}$ of one per cent. per month, and as having reinsured at the best terms they could obtain in the different insurance offices in the city. *Miller v. Tate*, 12 La. An. 160. 1857.

§ 35. Where an agent, whose duty it is to procure insurance for his principal, neglects to do so, he will be responsible for any loss that may result from his neglect. *Keane v. Brandon*, 12 La. An. 20. 1857.

§ 36. An agent, authorized to receive and forward applications to the company, and furnished with printed blanks therefor, has, as incidental to such power, authority to make all necessary explanations of the meaning and effect of the terms employed by the company in their interrogatories, and to agree with the applicant as to the terms which he shall employ to express the facts stated by him in answer to the interrogatories. In filling up application in answer to the question, "Is there a watch on the premises during the night," applicant said no, and then went on to state that there was a watch in the adjacent shop, who would be likely to see if anything were wrong, and agent said he was a watch, and so stated in application. On a petition in chancery to correct the mistake, relief was granted. Also mistake as to a common clock, being a watch clock, made by agent, was held to be purely a mistake, not affecting the policy. *Malleable Iron Works v. Phoenix Ins. Co.* 25 Conn. 465. 1857.

§ 37. One of the plaintiffs requested V. C. who was defendants' agent, "to receive applications and forward them to the defendants," to take the application and for-

ward it to the defendants. V. C. was then about half a mile from the plaintiffs' house and there filled in the heading of the application, and inserted the items of the property which the plaintiffs desired to insure, and the plaintiff, with whom V. C. did the business, signed the plaintiffs' name to the application. No conveniences were there for writing, and V. C. then left, saying he would fill out the rest of the application when he got where he could write. Nothing was said between the plaintiffs and V. C. about incumbrances on the property to be insured, nor was there any question in application concerning incumbrances, but, after the latter had gone off with the application, he inserted in it the statement, "There is no incumbrance except the Petrie mortgage." This statement was in fact untrue, there being besides the Petrie mortgage, another one for \$4,000. *Held*, that the plaintiffs were responsible for all that V. C. afterwards inserted in the application, although one condition of the policy required the survey to state materials, distance of buildings, location and character of same, &c., "for the correctness of which the company is responsible, if made by a duly authorized agent." *Smith v. Empire Ins. Co.* 25 Barb. N. Y. 497. 1857.

§ 38. Where a sub-agent or surveyor forwarded an application for insurance on his own property to a general agent empowered to issue policies in behalf of the defendant company, and the property was destroyed before the receipt of the application by such general agent, who was also informed of the loss before taking any action upon such application, and afterwards made out, and delivered a policy to such sub-agent, it was held, that there was no contract at the time of the loss, nor any before the loss was known to the agent, and that such agent had no authority to enter into agreements to pay for losses already occurred. *Bentley v. Columbia Ins. Co.* 17 N. Y. 421. 1858. *Affirming* 19 Barb. N. Y. 595. 1855.

§ 39. Where a sub-agent of an insurance company

was empowered to take and secure applications for the company and forward the same to an agent entrusted with blank policies to be issued, and to make insurances binding, until such agent should approve or disapprove them; *Held*, that such sub-agent had no power to take an application from himself for an insurance on his own property so as to bind the company. *Bentley v. Columbia Ins. Co.* 19 Barb. N. Y. 595. 1855. Affirmed in 17 N. Y. 421. 1858.

§ 40. Where the president of an insurance company was authorized by the by-laws "to adjust and pay all losses;" *Held*, that authority to use the means of the company for that purpose was implied, and if these means were negotiable notes, in order to use and transfer them, they must be endorsed, and authority of the president to endorse them, and that he had been in the habit of endorsing them, might be shown by parol evidence. *Baker v. Cotter*, 45 Me. 236. 1858.

§ 41. Two partners were insured on their stock of tools. Subsequently one partner sold out all his interest in the property to the other, and an agent of the company, who was only authorized to take applications for insurance and transmit them to the company, but having no authority to make binding contracts, was notified of this change, and said that, in his opinion, it made no difference, and need not be notified to the company. The company was never notified of the change; *Held*, that plaintiff could not recover without showing an assent of the company to the assignment, and that the notice to the agent was not sufficient. *Tate v. Citizens' Mut. Fire Ins. Co.* 13 Gray, Mass. 79. 1859.

§ 42. The by-laws of a mutual insurance company provided that the assured should pay his premium and give his deposit note before the policy should be delivered, and the directors, of whom assured was one, passed a vote that the premiums on all policies should be payable within

thirty days from their date, and if not paid within sixty days the policy should be considered as cancelled. A policy on brick dwelling house was made out for one of the directors, and with consent of the company, assigned to the plaintiff as mortgagee; a short time before the expiration of such policy the president made an oral agreement with the director to renew it, and make it payable in case of loss to the mortgagee, and, in pursuance of such agreement, the renewal was made out March 1st, 1857, and signed by the proper officers, but was never delivered, the premium not having been paid or a deposit note given. The president and secretary, several times before the fire, which occurred in June, 1857, requested the director to pay the premium and take the policy, but did not tell him that the policy would be cancelled if he did not do so. The agent of the plaintiff also called upon the president to inquire if the policy had been renewed, and the president told him that it had been renewed, and that mortgagee might consider herself insured, and need not give herself any further trouble about it. *Held*, that the president was but a special agent of the company, and could not by his agreements effect insurance on terms forbidden by the by-laws, and could no more bind the company by his representations beyond the scope of his authority, than by his agreements; and that the plaintiff who was the assignee, could not recover, although she did not know of the vote of the directors until after the fire. *Baxter v. Chelsea Mut. Fire Ins. Co.* 1 Allen, Mass. 294. 1861.

§ 43. Though, as between the principal and agent, the powers of the agent may be limited, it still frequently occurs that the powers of the agent are not thus limited where the rights of third persons intervene, if the principal has so acted as to induce such third persons to act upon the assumption of more extended or unlimited powers. And whether the company did thus hold their agent out, is a question of fact for the jury. *Keenan v. Missouri State Mut. Ins. Co.*; and *Ryder v. Same*, Sup. Court of Iowa, June Term. 1861.

§ 44. When the insurance company is a foreign corporation, to say that notice to a resident agent would not be good and binding on the company, would be in conflict with the spirit of the statute of Iowa (Acts of 1857, p. 207, s. 9), and to the rules of the common law governing the rights, duties and responsibilities of principal and agent. *Keenan v. Missouri State Mut. Ins. Co.*; and *Ryder v. Same*, Sup. Court of Iowa, June Term. 1861.

§ 45. Knowledge by an agent of facts working a forfeiture of the policy, in order to bind the company, must have been communicated to him as such agent, and not by mere rumors and talk upon the street corners. *Keenan v. Missouri State Mut. Ins. Co.*; and *Ryder v. Same*, Sup. Court of Iowa, June Term. 1861.

§ 46. Where certain statements respecting the title were made to H. an agent of defendants, and the latter claimed that H. was their agent only for certain definite purposes, and that he had no authority, as such, to fill out applications for parties applying for insurance; but defendants had recognized him in their policies as their agent, though there was no written evidence of the extent of his authority, and the court upon all the evidence, submitted the question as to the extent of his authority, wholly as one of fact, to the jury; *Held*, that this course was correct. *Hough v. City Fire Ins. Co.* 29 Conn. 10. 1860.

§ 47. An insurance company will not be allowed to take advantage of the mistakes or omissions of its agents, notwithstanding the rule that all parol statements and negotiations are merged in the written compact. *Beal v. Park Ins. Co.* 16 Wis. 241. 1862.

§ 48. Where a policy had been issued in the name of an insurance company by a person acting as its agent, but whose authority so to act was not shown, and such policy had been renewed by an authorized agent of the company; *Held*, that the company had ratified the act of the party

issuing the policy, and that his acts and declarations at the time the risk was taken were admissible in evidence against the company. *Beal v. Park Fire Ins. Co.* 16 Wis. 241. 1862.

§ 49. If a policy of insurance has ceased to have any effect, by reason of the insured having kept prohibited articles in the premises insured, a promise by the insurer's agent, having authority to adjust and pay losses, with knowledge that the prohibited articles were kept in the house at the time of the fire, will not bind his principal. *Phoenix Ins. Co. v. Lawrence*, 4 Metc. Ky. 9. 1862.

§ 50. An agent having general authority to insure the property of his principal, is not thereby authorized to insure in a mutual company, thereby making his principal a member and an insurer of others. *White v. Madison*, 26 N. Y. 117. 1862.

§ 51. Where it appeared in an action upon a policy of insurance that the insurance company had been in the habit of furnishing their agent with blank policies and renewal receipts, signed by their president and secretary, to be filled up by such agent when issued; and that the particular receipt used in this instance, when so furnished to the agent, contained a statement that it was not valid, unless countersigned by him; *Held*, that the company could not question the general authority of the agent to renew policies. *Carroll v. Charter Oak Ins. Co.* 40 Barb. N. Y. 292. 1863.

§ 52. A general agent for effecting insurances in behalf of a company has full power to insure, to renew, and to receive notice of other insurances; and his giving a renewal receipt and subsequent acceptance of the premium, with notice of a breach in respect to other insurances, is as effectual a waiver of the breach as if the premium had been paid, and he had accepted it with notice, at the time when the renewal receipt was issued. *Carroll v. Charter Oak Ins. Co.* 40 Barb. N. Y. 292. 1863.

§ 53. A local agent of an insurance company issued a policy upon the interest of a mortgagee in certain property. The agent had been instructed by the company not to take applications upon mortgage interests. *Held*, that the insured could not be prejudiced by the fact that such instructions had been given; he having no knowledge of such a limitation of the powers of the agent. *Woodbury Savings Bank v. Charter Oak Ins. Co.* 31 Conn. 518. 1863.

§ 54. The local agents of insurance companies, who are authorized to procure and forward applications for insurance, are deemed the agents of the companies and not of the applicants, so far as any mistakes of the application made by them or by the applicant under their direction, are concerned; and an agent employed by such a local agent, in pursuance of a custom known to and approved by the company, to solicit and forward to him applications for insurance, stands in the same relation to the company as to such mistakes. *Woodbury Savings Bank v. Charter Oak Ins. Co.* 31 Conn. 517. 1863.

§ 55. If an insurance company, on notice of loss, refer the insured to their resident agent for settlement, and instruct the agent to procure a statement of the loss, he is thereby invested with full authority to receive such statement, and to extend the time for furnishing it, and if given within the time required by the agent, the condition in the policy requiring it to be made within a less time, is not broken. *Lycoming County Mut. Ins. Co. v. Schollenberger*, 44 Penn. St. 259. 1863.

§ 56. Where an agent, by the power of attorney appointing him, was authorized to "make insurance by policies of" the defendant company, to "renew the same, and to indorse upon policies issued by him, permission to the assured to vary the risk, according to the rules and instructions he shall from time to time receive from said company, and all policies issued by said agent, shall be to

all intents valid and binding upon said company ;" and, upon the receipt of an additional premium fixed by him, such agent varied the risk by a written permission to run the factory insured "day and night," until the expiration of the policy, without prejudice; and the factory was burned in the night; *Held*, that in the absence of any proof that the agent had violated any rules or regulations he may have received from the company, the permit to run nights was binding on the company, and the agent had ample power to waive such previous running which had come to his knowledge. *North Berwick Co. v. New England F. & M. Ins. Co.* 52 Me. 336. 1864.

§ 57. The possession and use by an agent, of an insurance company's certificates of renewal, together with the exercise of that authority in other instances, indicate that the power of renewing and continuing insurances, has been conferred upon such agent. *Post v. Aetna Ins. Co.* 43 Barb. N. Y. 351. 1864.

§ 58. That an individual is authorized to accept risks, to agree upon and settle the terms of insurance, and to carry them into effect by issuing and renewing policies, on behalf of an insurance company, is sufficient to constitute him a general agent for the company, at the place where his business as such agent is transacted; and he can as well exercise his authority of renewing and continuing a policy which has already expired, as by making and issuing a new one. *Post v. Aetna Ins. Co.* 43 Barb. N. Y. 351. 1864.

§ 59. An action may be maintained on a premium note to recover assessments where the application contains an express agreement on the part of the applicant, that "the company shall not be bound by any act done, or statement made to, or by any agent or others, not contained in the application," and the policy is issued upon condition that "every insurance agent, broker, or other person, forwarding applications or receiving premiums, is

the agent of the applicant, and not of the company," although the defendant was induced to take out the policy by fraudulent misrepresentations, as to the condition of the company, by one who had acted as its general agent. *Shawmut Mut. Fire Ins. Co. v. Stevens*, 9 Allen, Mass. 332. 1864.

§ 60. Mere knowledge by an agent of an insurance company of acts which would avoid a policy issued by his principal without objection thereto, does not bind the company. *Ayres v. Hartford Fire Ins. Co.* 17 Iowa, 176. 1864.

§ 61. An agent of a mutual insurance company, whose duty is to take surveys, receive applications for insurance, examine the circumstances of a loss, approve assignments, and receive assessments, is not authorized to accept notice of over insurance, or waive its consequences. *Mitchell v. Lycoming Mutual Ins. Co.* 51 Penn. St. 402. 1865.

§ 62. An insurance agent, having the power to receive premiums, will be presumed to have authority to give permission to the holder of a policy to remove the property insured, to another locality. It is sufficient that the party acting as agent, was the authorized agent of the company. Having indorsed in writing on the policy, the consent, for an enhanced premium, for the removal of the property, the company should be held to it and bound by it. *New England Fire & Marine Ins. Co. v. Schettler*, 38 Ill. 166. 1865.

§ 63. Where a party applying to the agent of an insurance company for insurance, mentions that he has other insurance, specifying it, he ought not to be prejudiced by the neglect of the agent to note such insurance on the policy. *New England Fire & Marine Ins. Co. v. Schettler*, 38 Ill. 166. 1865.

§ 64. Although in the printed terms of a policy it is stated that no policy will be considered binding until the premium is paid, yet a general agent of the company may waive such conditions and give a short credit. *Boehen v. Williamsburgh City Ins. Co.* 35 N. Y. 131. 1866.

§ 65. A notice to the agent of an insurance company of facts material to the risk, is notice to the company. *People's Ins. Co. v. Spencer*, 53 Penn. St. 353. 1866.

§ 66. The local agent of an insurance company having power to pass upon applications for insurance, and issue policies without forwarding the application or submitting the matter to the company upon receiving an application, was informed of the condition of the ownership of the property, but failed to take down correctly the facts stated, and the policy was thereupon issued by such agent and received by the assured in ignorance of any mis-statement or omission; *Held*, that the company was bound by the act of the agent, and could not defeat a recovery on the ground that the agent did not correctly state in the policy the facts concerning the interest or title of the assured. *Ayres v. Home Ins. Co.* 21 Iowa, 185. 1866.

§ 67. The secretary of an insurance company is presumed to be the official agent to carry into effect the votes and directions of those who have the management of its affairs, unless the contrary appears. *Leary v. Blanchard*, 48 Me. 269. 1860.

§ 68. The authority of the president of an insurance company to make a valid indorsement of its notes, may be shown without proof of a formal vote of the directors for that purpose. That he was in the habit of so doing, and that his indorsements had been recognized by the company is sufficient. *Topping v. Bickford*, 4 Allen, Mass. 120. 1862.

See Alienation, § 28. Application, 11, 17, 18, 19, 20, 21, 28, 29, 30. Arbitration, 7. Assessments, 36. Assignment, 10, 11, 14. Cancellation, 2, 5. Classification of Risks, 3. Concealment, 26. Consummation of Contract, 2, 3, 16, 18. Description of Property, 11, 13. Distance of Other Buildings, 7, 11, 12, 18, 21, 22. Encumbrance, 6, 8, 14, 20, 22, 25, 27, 32. Evidence, 11, 23, 44. Foreign Insurance Companies, 4, 22. Fraud, 4, 5. Garnishment or Trustee Process, 6. Gunpowder, 7. Increase of Risk, 20. Notice of Loss, 2, 18. Other Insurance, 20, 23, 32, 37, 38, 46, 48, 52, 61, 72, 78, 81, 85. Parol Contract, 4, 5, 7. Parol Evidence, 2, 3, 14, 15, 17, 21, 26. Payment of Premium, 2, 4, 8, 9, 10, 12, 22. Pleading and Practice, 51. Preliminary Proofs, 29, 31. Premium Notes, 16, 21, 32. Premium Notes in Advance, 3, 9, 10. Reform of Policy, 4. Set-off, 1. Usage, 11. Warranty and Representation, 25.

ALIENATION.

§ 1. After the issuing of the policy, the assured sold and conveyed to one H. a part of the building insured, reserving a term of seven years in the premises; and H. at the same time re-conveyed them to the assured in mortgage to secure the purchase money. *Held*, that the transaction was to be considered as a conditional sale after the expiration of seven years, and that the policy continued binding to the extent of assured's interest. *Stetson v. Massachusetts Ins. Co.* 4 Mass. 330. 1808.

§ 2. The policy contained a provision, that if the property should be sold or conveyed, in whole or in part, the policy should become void. Assured had executed mortgages on the insured property, prior to the insurance, which were foreclosed subsequent to making of policy, leaving the equity of redemption in assured at date of fire; *Held*, that assured had not been divested of his insurable interest by such foreclosure and sale, and that he might recover the whole amount of damage to the property, not exceeding the sum insured. *Strong v. Manufacturers' Ins. Co.* 10 Pick. Mass. 40. 1830.

§ 3. Plaintiff had his store building and merchandise therein, insured. After insuring, he sold the merchandise and leased the building by parol, and, six months afterwards, took them back again. *Held*, that this was not an alienation within meaning of the condition providing, that "alienation by sale or otherwise should avoid the policy;" and that policy would re-attach to any goods, belonging to assured, that might be in the store during life of the policy, not exceeding the amount insured. *Lane v. Maine Mut. Fire Ins. Co.* 12 Me. 44. 1835.

§ 4. If the assured sell the property and part with all his interest therein before the loss happens, the policy is at an end unless assigned to the purchaser with consent of company, but if he retains a partial interest in the property, the policy will protect such interest, nothing therein being contrary to a change of title or interest. *Aetna Ins. Co. v. Tyler*, 16 Wend. N. Y. 385. 1836.

§ 5. A by-law of a mutual insurance company provided, "When any mansion, house, or other building shall be alienated by sale or otherwise, the policy shall thereupon be *ipso facto* void," &c., but the grantee or alienee might have the same confirmed to him; and another by-law provided "that where any estate mortgaged shall be taken possession of by the mortgagee for breach of the condition expressed in the mortgage, deed, or in any bond of defeasance, the policy shall thereupon be absolutely void, unless the policy shall be transferred to the mortgagee with the consent of the president." The assured executed a mortgage on the insured premises, after the issuing of the policy; *Held*, that the execution of such mortgage was not an alienation within meaning of the condition. *Jackson v. Massachusetts Mut. Fire Ins. Co.* 23 Pick. Mass. 418. 1839.

§ 6. Plaintiff insured a mill for \$4,000 with defendants. Subsequent to the insurance, and before a loss, he entered into a contract with N. to sell him the premises for \$16,000, and executed a deed to N., whereupon N. executed a mortgage back to secure the payment of \$11,000, and the residue of the purchase money, \$5,000, was to remain open until the close of a controversy between one White and the plaintiff in respect to encumbrances on the property, and the deed and mortgage were placed in the hands of a third party until the controversy was settled, and were in said third party's hands at time of fire, "the incumbrance matter" not yet having been settled. Both deed and mortgage had also been recorded. *Held*, that the deed did not take effect as an operative instrument

until the happening of the contingency provided for, and that the fact of its having been recorded, was only *prima facie* evidence of a delivery, and might consequently be rebutted, and that therefore these transactions did not divest the plaintiff of his insurable interest in the premises. *Gilbert v. North American Fire Ins. Co.* 23 Wend. N. Y. 43. 1840.

§ 7. Plaintiff insured house and kitchen for \$2,300, and before loss, made a donation *inter vivos* of the property to another, with no restriction, except that she should not alienate or dispose of the property except by last will and testament. *Held*, that at time of loss there did not remain in plaintiff such an interest as entitled him to recover. *Macarty v. Commercial Ins. Co.* 17 La. 365. 1841.

§ 8. If insured part with his interest in the property before a loss, the policy is void. *Wilson v. Hill*, 3 Met. Mass. 66. 1841.

§ 9. Policy for "\$3,000 on household furniture, liquors, bar-room fixtures, and billiard tables, contained in a building situate," &c., provided "that the interest of the assured in this policy is not assignable unless by consent manifested in writing, and in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent, this policy shall from thenceforth be void." The assured, subsequent to the insurance, sold the property to another, who retained possession about six months, when the assured again took possession in consequence of non-payment by the vendee, and was in possession and owned the goods at the time of the fire. *Held*, that the clause referred to an absolute termination of interest, and not to a temporary alienation; that the risk was only suspended whilst in possession of vendee, and revived again upon her coming into possession; and that, having had an interest at time of insurance, and also at time of the loss, she might recover. *Power v. Ocean Ins. Co.* 19 La. 28. 1841.

§ 10. An agreement by the insured to convey the premises insured at a future day on payment of the purchase money, is not such an alienation as to defeat a policy, where a loss occurs after the agreement and before the conveyance, and assured remains in possession of the property. *Trumbull v. Portage County Mut. Ins. Co.* 12 Ohio 305. 1843.

§ 11. Where two parties owning property jointly, effect an insurance, and before a loss, one sells to the other, an action cannot be maintained in their joint names, they having no joint interest at the time of the loss. *Howard v. Albany Ins. Co.* 3 Denio, N. Y. 301. 1846.

§ 12. Under clause requiring notice of alienation to be given to the company, and an assignment of the policy to be made to the alienee within sixty days; *Held*, 1st, that a conveyance to trustees for the benefit of creditors was an alienation; 2d, that the grantor was estopped from alleging such conveyance to be fraudulent and void; 3d, that the assignment and notice must be made and given before loss, being of no avail when made and given after loss, though within the sixty days. *Dadmun Manuf. Co. v. Worcester Mut. Fire Ins. Co.* 11 Met. Mass. 429. 1846.

§ 13. The 12th section of the statute incorporating the Vermont Mutual Fire Insurance Company provided "That when any house or other building shall be alienated by sale or otherwise, the policy shall be void." The assured conveyed the premises to D., and on the same day D. executed to assured a deed of the same premises containing the condition that if he paid to assured two thousand dollars in three years from date, and should allow assured to hold the peaceable possession until the said sum was fully paid, then the deed to be void. *Held* that this was only a conditional sale, and not such an alienation, within the terms of the statute, as would vitiate the policy. *Tittmore v. Vermont Mut. Fire Ins. Co.* 20 Vt. 546. 1848.

§ 14. A mortgage of property insured is not an alienation within the meaning of the condition, "That if the property insured shall be alienated by sale or otherwise, the policy shall be void." *Conover v. Mutual Ins. Co.* 3 Denio, N. Y. 254. 1846. Affirmed 1 Comst. N. Y. 290. 1848.

§ 15. Where policy provided, "That if the building should be alienated by sale or otherwise, the policy should be void;" *Held*, that a transfer of the property to assignee by decree issued upon application for bankruptcy, was an alienation within meaning of the condition. *Held* also, that an alienation had occurred, where the assured had given an absolute deed and taken back an agreement for reconveyance, provided he should pay a certain amount within ten years. *Adams v. Rockingham Mut. Ins. Co.* 29 Me. 292. 1849.

§ 16. Where two partners, owning property jointly, effected an insurance in their names, and, before a loss, one partner conveyed all his interest to the other; *Held*, that an action could not be maintained in their joint names, although the secretary of the company at time of the sale made the following endorsement on the policy, to wit: "Consented the within policy remain good to Nelson Murdoch, who is the sole owner now of the said insured mill." *Murdock v. Chenango County Mut. Ins. Co.* 2 Comst. N. Y. 210. 1849.

§ 17. A. was tenant for life, of one-third of a lot, and for years, of the other two-thirds. Her husband built a house on the ground and insured it as his. They then sold to the reversioner for annual payments, and husband quitclaimed and took back a mortgage, the mortgagor taking possession. Before any of the payments became due, the house was burned. *Held*, that there had been such an alienation as to avoid the policy, under the usual by-law, prohibiting an alienation in whole or in part. *Abbott v. Hampden Ins. Co.* 30 Me. 414. 1849.

§ 18. Where a policy provided that, "when any property insured by this company shall in any way be alienated, the policy shall thereupon be void;" and there were several distinct subjects of insurance, separately valued, but all in the same policy, one of which was afterward conveyed; held, that the conveyance only avoided the policy as to the property alienated. *Clark v. New England Mut. Ins. Co.* 6 Cush. Mass. 342. 1850.

§ 19. The levy of an execution on premises insured, will not avoid a policy, as being an alienation, for, until the expiration of the time for redemption, the assured still retains an interest in the premises. *Clark v. New England Mut. Ins. Co.* 6 Cush. Mass. 342. 1850.

§ 20. A sale or mortgage of the property insured in this company, renders the policy void and loses the lien of the company on the same. *Indiana Mut. Fire Ins. Co. v. Coquillard*, 2 Carter, Ind. 645. 1851. *McCulloch v. Indiana Mut. Fire Ins. Co.* 8 Blackf. Ind. 80. 1846.

§ 21. Three partners, owning a flouring mill jointly, effected an insurance on the same, for the sum of twenty-five hundred dollars, and assigned the policy, with the insurers' consent, to a mortgagee of the mill insured. Subsequently, one of the partners conveyed to the others his interest in the mill without the consent of the company. The policy provided, "That when property insured shall be alienated by sale or otherwise, the policy shall be void." *Held*, 1st, that an action could not be maintained in the names of the three partners for their own benefit; 2d, but that the conveyance did not affect the right of the assignee, who might recover in their names the amount of his mortgage. *Tillow v. Kingston Mut. Ins. Co.* 1 Seld. N. Y. 405. 1851. Reversing 7 Barb. N. Y. 570.

§ 22. The policy provided that, "When any building shall be alienated by sale or otherwise, the policy shall

thereupon be void. No mortgaged estate shall be deemed to be alienated, within the meaning of this article, until the mortgage shall have been foreclosed. And any policy payable to a mortgagee in case of loss, shall continue so payable, notwithstanding any alienation of the estate made subsequent to such mortgage; provided such mortgagee shall pay any and all assessments, for which the company would have had a lien on the estate, if no such alienation had been made, if the original assured shall not pay the same on demand." The policy was issued to B. on their dwelling house, "payable in case of loss to John T. Macomber, mortgagee," in March, 1844; in February, 1844, the mortgage to Macomber had been executed by B.; in September, 1847, B. conveyed the entire interest in the estate, subject to the mortgage, to Wheeler; in November, 1846, Macomber assigned his interest in the policy, and his mortgage, to one C. who, in September, 1847, assigned the same to Wheeler; Wheeler then entered upon the premises for the purpose of foreclosing the mortgage, and remained in possession until the fire, which occurred in March, 1849. After the conveyances above mentioned, the company collected two assessments from B; *Held*, 1st, that under this policy, an alienation by the assured would not bar the right of the mortgagee or his assignee to claim when the loss should happen, and that the assignee might sue for his benefit, in the name of the assignor; but second, that when Wheeler legally acquired the entire equity of redemption, and then took an assignment of the mortgage, the two interests coalesced, and worked a merger, which vested in him an estate in fee, and effectually foreclosed the mortgage, before the loss by fire; that such foreclosure was within meaning of the condition, and assignee of mortgagee could not, therefore, recover. *Macomber v. Cambridge Mut. Fire Ins. Co.* 8 Cush. Mass. 133. 1851.

§ 23. Personal property, after being insured against fire in two companies for \$600, was sold by the insured, and, but one-half the purchase money being paid, and judgment note being given for balance, it was agreed be-

tween the vendor and the vendee, that the vendor was to retain possession of the property and policies of insurance till he was paid in full. The property was destroyed by fire before payment in full, and the claims against the insurance companies were attached by a creditor of the vendor; *Held*, that such a possession was good as between the parties to the sale; that, in favor of the creditors of the vendor, the goods might be treated as his; that, as against the insurance companies, the vendor was to be considered as the owner to the extent of the unpaid purchase money; and that he or his creditors might recover that amount under the policies. *Norcross v. Insurance Co.* 17 Penn. St. 429. 1851.

§ 24. Plaintiff insured her mill and afterwards made a contract to sell, but none of the conditions of the contract were performed at time of fire, nor were ever performed afterwards, nor had any deed been given; *Held*, not to be an alienation of the property insured within the meaning of the section in the charter prohibiting "an alienation by sale or otherwise." *Masters v. Madison County Mut. Ins. Co.* 11 Barb. N. Y. 624. 1851.

§ 25. Policy, containing stipulation that any "transfer or change of title should avoid the policy," was issued on a hotel, which was mortgaged, and policy, with consent of the company, assigned to a mortgagee as collateral security. After the insurance and before the fire, the mortgaged premises were sold by a master in chancery, under a decree of foreclosure, and part of the purchase money paid by purchaser, though no deed was executed at the time of sale, nor until after the fire; *Held*, that it was a change of title, within the meaning of the condition, that avoided the policy, the sale being valid, and deed afterwards given relating back to the day of sale. *McLaren v. Hartford Fire Ins. Co.* 1 Seld. N. Y. 151. 1851.

§ 26. Policy was issued on mortgaged property, to mortgagor, made payable in case of loss to the mortgagee.

Prior to the loss, the property, by foreclosure of the mortgage, became vested in the mortgagee; *Held*, that the mortgagee was entitled to sue and recover for the loss in the name of the mortgagor, and the fact that by the foreclosure, the mortgagor, to whom the policy was issued, lost his interest in the property, did not defeat the policy. *Bragg v. New England Mut. Fire Ins. Co.* 5 Fost. N. H. 289. 1852.

§ 27. An agreement to sell, but deed not made or purchase money paid, will not divest assured of his interest, so as to bar an action in case of loss. *Perry Ins. Co. v. Stewart*, 19 Penn. St. 45. 1852.

§ 28. Philips procured a policy of defendant, in name of Daniel Flint, and in his application set forth the title to the property in these words: "The property belongs to Daniel Flint, of which Jacob Philips has a bond for a deed." The policy was then assigned to Philips in these words: "I hereby assign and transfer the within policy to J. M. Philips for his benefit in case of loss. Daniel Flint." This was assented to by the president of the company. The company set up in defense that, under their by-law providing that when property shall be alienated by sale or otherwise, the grantee might have the policy confirmed to him with the consent of the directors, &c. the policy was void, as the president's consent was not a compliance with such by-law. *Held*, that the above clause had application only in cases of alienation of insured property. And further held, that although the assent of the directors was necessary under another by-law, providing that "the president and directors shall have the management and the direction of all matters and things not otherwise provided for in these regulations," such assent would be implied where the president was in the habit of assenting to policies without objection by the directors or the corporation. It is too late to take such an objection after the assignment has remained for months unquestioned on the records of the company. *Philips v. Merrimack Mut. Fire Ins. Co.* 10 Cush. Mass. 350. 1852.

§ 29. Where charter provided that "in case of alienation by sale or otherwise, the policy should be void;" *Held*, that the descent of title to "heirs" was not an alienation within meaning of the charter. *Burbank v. Rockingham Ins. Co.* 4 Fost. N. H. 550. 1852.

§ 30. Plaintiffs were insured with defendants to the amount of \$7,500 on movable machinery and stock in a cotton mill. Whilst policy was in force, and before the loss, the plaintiffs made a bill of sale of a large part of the property to one of their creditors, as security for the amount due said creditors, plaintiffs remaining in possession as before. The policy provided that "The interest of the assured in this policy is not assignable, unless by consent of this corporation, manifested in writing, and in case of any transfer or termination of the interest of the assured in this policy, either by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect." *Held*, 1st, that the clause was not applicable to this case, as nothing short of a termination of the interest of the assured in this policy could work a forfeiture, which termination had not occurred, as the assured were yet interested in the policy to the extent of the value of the property unsold, and for which amount they might recover; and 2d, that the sale, being one that would in equity be treated as a mortgage, did not change or terminate the interest of the assured within the meaning of the condition. *Holbrook v. American Ins. Co.* 1 Curtis C. C. U. S., 193. 1852.

§ 31. Where policy upon goods of two partners provided, "That any transfer or change of title in the property insured" should avoid the policy; *Held*, that a dissolution of partnership before a loss, and division of the goods, so that each partner owned distinct portions, though not strictly a sale of the goods, was yet a change of title within meaning of the condition. *Dreher v. Aetna Ins. Co.* 18 Mo. 128. 1853.

§ 32. Where two partners in trade took an insurance

on their stock of goods, and, during the continuance of the policy and before the loss, one of the said partners sold and assigned his interest in the stock of goods to the other, but did not assign the policy, which provided, "that it should become void by assignment without consent of the underwriters"; *Held*, that such transfer of the property insured did not avoid the policy, and remaining partner might maintain an action at common law in name of the firm for his own use and benefit, and recover for the loss of his original interest, but not for a loss to the interest of his copartner, so assigned to him, for that had ceased to be covered by the policy. *Hobbs v. Memphis Ins. Co.* 1 Sneed, Tenn. 444. 1853.

§ 33. Where A. effected an insurance on dwelling house and afterwards sold it to B., who at the same time re-conveyed it to a trustee to secure to A. the payment of the purchase money; *Held*, that A. retained an insurable interest, and, after a loss, might recover to the extent of his actual loss, not to exceed the sum insured. (Does not appear from decision that there were any prohibitions in policy against sale, transfer, or change of title, or alienation.) *Morrison v. Tennessee M. & F. Ins. Co.* 18 Mo. 262. 1853.

§ 34. When underwriting for a firm, the insurers are presumed to know, and be satisfied with, each and every one of its members. They are also presumed to know, that on the death of either of two partners, the survivor, for all purposes, becomes the sole legal, and, on a favorable state of the account, the sole equitable owner of the partnership assets. They know too that on a voluntary dissolution of the firm, if one partner has drawn out more than his share, the other will thereby have been made the sole owner of the assets remaining. They therefore agree, in effect, that a transfer of interest from one partner to the other, is within the original understanding, and that it shall form no objection, in case of loss, to the right of recovery. It is an assent necessarily implied from the nature of the contract, and given in advance; and there-

fore requiring no subsequent notice. *Wilson v. Genesee Mut. Ins. Co.* 16 Barb. N. Y. 511. 1853.

§ 35. Where the assured assigned his policy to the mortgagee of the premises insured, as collateral security, with the consent of the insurer, and mortgagee also signed the premium note of original assured, and afterwards mortgagor, or original insured, sold a portion of the premises absolutely, and at the same time took back a lease for five years at a nominal rent and under agreement to keep and leave the premises in good repair; *Held*, that under the condition of the charter, prohibiting any "alienation of the property insured, by sale or otherwise," &c., the policy was void as to the mortgagor's interest, but that recovery might be had to the amount due on the mortgage to mortgagee. *Boynton v. Clinton & Essex Mut. Ins. Co.* 16 Barb. N. Y. 254. 1853.

§ 36. Where goods had been levied on by the sheriff, who did not remove them from assured's store, but proceeded to sell the same at auction, and a part of them had been sold, and the sale was yet going on at the time of the fire; *Held*, that it was not an alienation that avoided the policy. *Rice v. Tower*, 1 Gray, Mass. 426. 1854.

§ 37. Where assured executed a mortgage on the stock of goods insured, after effecting insurance, but remained in possession until the time of the fire; *Held*, not such an alienation as vacated the policy. *Rice v. Tower*, 1 Gray, Mass. 426. 1854.

§ 38. A parol contract for the sale of personal property does not avoid the policy under prohibition against change of title, when the money has not been paid or the goods delivered, but still remain in possession of assured at time of fire. *Ætna Ins. Co. v. Jackson*, 16 B. Monroe, Ky. 242. 1855.

§ 39. A mortgage of the property insured is not an "alienation" within the meaning of a clause prohibiting any alienation by sale or otherwise. *Rollins v. Columbian Fire Ins. Co.* 5 Fost. N.H. 200. 1853. *Pollard v. Somerset Mut. Fire Ins. Co.* 42 Me. 221. 1856.

§ 40. Where policy had been assigned with the consent of the company to a third party as collateral security, and the assignee had no claim against the property by deed or mortgage, and original assured afterwards conveyed the property to another party; *Held*, that such conveyance avoided the policy, under clause of alienation, in hands of assignee, as well as of assignor, and that an attachment by assignee against original insured, did not give him a right of recovery under the assigned policy on his interest by attachment, nor by the original interest, though the conveyance of the property was fraudulent as between the original insured and the grantee. *Brinsley v. City Fire Ins. Co.* 26 Conn. 165. 1857.

§ 41. B. took a policy, dated June 11, 1853, upon "his interest, being one-half of a wooden steam saw mill," and indorsed thereon the following: "June 12th, 1853. In case of loss, pay the within to Josiah Q. Loring, Esq., to secure his mortgage." This indorsement was regularly assented to by the company. B. afterward conveyed to H. all his interest in the saw mill. The policy contained the following conditions: "If the property insured shall be sold or conveyed, in whole or in part, the risk shall cease, and the policy shall become void;" but "the policy may continue for the benefit of such purchaser, if this company give their assent thereto, to be evidenced by a certificate of the fact, or by indorsement on the policy." An action was brought on the policy by Loring; *Held*, that the policy was not assigned to L. and did not become an insurance on his interest as mortgagee, but he had a mere written order to pay him such sum as should become payable to B. thereon; and that the alienation to H. avoided the policy.

It further appeared that B. took another policy in same company, dated June 18, 1853, on "his interest, being three-tenths," in said saw-mill, and assigned the same to H. reciting in the assignment that he had "sold the within named property to" him; and to this assignment the company gave its written consent; *Held*, that this was only notice to the company of the conveyance to H. of the three-tenths interest described, and did not affect the policy of June 11th.

Held further, that the assent of the company to the conveyance to H. of the property described in the policy of June 11th, could not be shown by parol; but that the evidence of such assent must be in writing. *Loring v. Manufacturers Ins. Co.* 8 Gray, Mass. 28. 1857.

§ 42. Policy on stock of goods, which, after effecting insurance, were sold on execution and bought in by the plaintiff, who had the policy assigned to himself, with the consent of the company, but without specially disclosing the nature of his interest in the insured property; *Held*, 1st, that the sale of the goods did not avoid, but only suspended, the policy, which was still a valid and subsisting contract in the hands of the original assured, and would re-attach to the same kind of goods afterwards purchased, and put in the same place, and was also, therefore, valid in hands of one to whom policy had been assigned, with the consent of the company; and 2d, that application to an insurer for his consent to the assignment of a policy, was notice that the applicant had acquired, or was about to acquire, some interest in the subject of insurance, since, without such interest, an assignment would be valueless to him. *Hooper v. Hudson River Ins. Co.* 15 Barb. N. Y. 413. 1853. Affirmed 17 N. Y. 424. 1858.

§ 43. Where policy provided that "the insurance by this policy shall cease from the time the property hereby insured shall be levied on or taken into possession or custody under an execution or other proceeding at law or in equity;" *Held*, that the clause referred to executions sub-

sequent to the taking out of the policy, and the fact that the property was under execution at time of the insurance, and continued so until the time of the fire, did not affect the right of the holder of the policy. *Rex v. Insurance Co. 2 Philadelphia, Pa. 357. 1858.*

§ 44. Policy was issued to a partnership and afterwards one of the partners sold his interest in the property insured to the other. The act of incorporation and by-laws declared that when property insured was alienated by "sale or otherwise," the policy should become void, and this was expressly made a condition of the policy; *Held*, that the said sale was within the prohibition against alienation. *Finl y v. Lycoming Mut. Ins. Co. 30 Penn. St. 311. 1858.*

§ 45. The assignment of a part of a mortgage debt, prior to the insurance, to a third person, for whom no claim is made under the policy, does not affect the right of the mortgagee to recover for the remainder. *Rex v. Insurance Co. 2 Philadelphia, Pa. 357. 1858.*

§ 46. The policy provided that "in case of any sale, transfer or change of title in the property insured by this company, such insurance shall be void." In order to prevent attachment of the goods insured by her creditors, the assured represented that she had sold the goods to one C. who was also a creditor. There was no bill of sale of the property given, but a mere agreement between assured and C. that if any of her creditors came, she was to tell them that the goods belonged to C.; *Held*, that this was not an alienation that avoided the policy; that to constitute a breach of the condition, there must have been an actual sale or transfer of the property, valid as between the parties. *Orrell v. Hampden Fire Ins. Co. 13 Gray, Mass. 431. 1859.*

§ 47. Where by-law provided that, "When any property insured in the company shall in any way be

alienated, the policy thereupon shall be void," and another by-law, that "when the title of any property insured shall be changed by sale, mortgage, or otherwise, the policy shall thereupon be void;" a mortgage made on the insured premises after effecting the insurance, does not avoid the policy. A mortgage and foreclosure are both necessary to make it a change of title within the meaning of the condition. *Sheperd v. Union Mutual Fire Ins. Co.* 38 N. H. 232. 1859.

§ 48. Where one of three partners, who had effected insurance, afterwards and before a loss, sells his interest to the other two, without notice to, or consent of the insurers, the entire policy is void by reason of the condition that "in case of any transfer or change of title in the property insured by this company, or of any undivided interest therein, such insurance shall be void and cease." And an action cannot be maintained in the name of the three partners, when the declaration shows that one partner has no interest. *Dix v. Mercantile Ins. Co.* 22 Ill. 272. 1859.

§ 49. An insurance policy was issued under seal to J. McGowan & Sons, for one year, with a covenant, that it should continue so long as the assured or their assigns should pay the premium, and the company should accept and receive the same from them. The firm was composed of John McGowan and his two sons at time policy was issued, and the father retired from the firm during the year, and after making the insurance, and the business was continued by the two sons under the same title, "J. McGowan & Sons." The day preceding the expiration of the policy the premium for the second year was paid, and a renewal receipt endorsed upon the policy, stating that the company had received the premium from J. McGowan & Sons under policy No. 12,704, "which is hereby continued in force for another year." The company had no knowledge of the change of the firm, and during the second year a loss occurred. In an action by the plaintiffs, (the

two sons,) *Held*, 1st, that the renewal receipt was not a parol and new contract with other parties on which action of assumpsit might be brought, but was simply an extension for another year of the original sealed contract, and the plaintiffs not being the covenantees nor their assignees, could not maintain an action of covenant upon the policy; 2d, but, whether specially or parol, no action could be maintained on the contract, except by the parties insured; it was a joint contract, and whatever sum could be recovered, would be *in solido*, and no one of the parties insured could sue alone for his proportion. *Baltimore Fire Ins. Co. v. McGowan*, 16 Md. 47. 1859.

§ 50. Policy provided that "Whenever any member of this company, who has an insurance on goods or other personal property only, shall *bona fide* alienate or sell out said goods or other personal property, he may have the same privilege of surrendering or assigning his policy, and in the same form and manner as is provided for in the 12th section of the act of incorporation, in case of the alienation or sale of the building." The section thus referred to, provided "That when any building shall be alienated, the policy shall thereupon be void, and surrendered to the directors to be cancelled," &c. The machinery of a woolen mill was insured under this policy for \$5,000, and subsequent to such insurance a mortgage for \$10,000 was executed on said machinery, in connection with other property, which mortgage was afterwards foreclosed, and the property sold by a master in chancery, in pursuance of a decree, and the proceeds of such sale, by order of the Court, applied to the satisfaction *pro tanto*, of such decree. The property was then destroyed by fire. *Held*, that assured could not recover for the loss, although subsequently to such loss, and before the commencement of the action on the policy, the sale was, by consent of all parties thereto, set aside by order of the court under whose decree the sale was made. *Mount Vernon Manf. Co. v. Summit County Mut. Fire Ins. Co.* 10 Ohio St. 347. 1859.

§ 51. The policy provided that "The interest of the insured in this policy is not assignable, unless by consent of this corporation manifested in writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect." The policy was several times renewed, and previous to its last renewal in 1856, the assured gave a bond for a deed to the premises to one S., in consideration of \$5,500, of which part was paid in cash, and two notes of \$1,500 each, due in twelve and twenty-four months, given for the balance. By the terms of the bond, the premises were to be kept insured by the plaintiff, for the benefit of S. who was to pay the premiums thereon. S. took and kept possession of the premises, and before the fire paid the first note of \$1,500—and subsequent to the fire, and the commencement of this action, paid the other note of \$1,500, and thereupon received a warranty deed of the insured premises. The company had no notice of this sale and change of possession until after the fire. The policy was for \$2,000. *Held*, 1st, that the executory contract, above stated, was not a violation of the provision in the policy; that such clause referred to the property insured, and that as the plaintiff was interested, at time of the fire, to the extent of the unpaid purchase money, he had not parted with all interest, and might recover to the extent of \$1,500, the amount then due, and no more; 2d, that the insurers would not have been entitled to be subrogated to the rights of the plaintiff, even if they had paid the \$1,500, upon the commencement of the suit; 3d, that the payment of the balance due, since the commencement of the suit, made no difference, as coupled with the agreement in the contract, to keep the premises insured for the benefit of S. and the payment of the premium thereon by the latter, it was perfectly equitable, that, as between the plaintiff and S. the insurance money should go to the latter—and that the plaintiff having a clear right of action at the commencement of the suit, the court would not act upon proof of such payment, not brought before it by the pleadings, to defeat a just demand against the company. *Shotwell v. Jefferson Ins. Co.* 5 Bosw. N. Y. 247. 1859.

§ 52. The policy was made subject to by-laws, one of which provided that "when any property insured by this company shall be taken possession of by a mortgagee, or in any way be alienated, the policy shall be void." The judge of insolvency, by a deed of assignment in the usual form, assigned all the property of insured, upon his voluntary application, to assignees. *Held*, that this was an alienation within the meaning of said by-law, and that the policy was void; and further held, that this conclusion was not affected by the fact that a part of the sum insured was made payable in case of loss to a third party. *Young v. Eagle Fire Ins. Co.* 14 Gray, Mass. 150. 1859.

§ 53. In a policy obtained by A. upon his storehouse, and upon his stock of goods therein, each for a certain sum, there was a condition that "in case of any transfer, partial transfer, or change of title in the property insured, such insurance shall be void and of no effect," &c. A. afterwards sold a part of his stock, without notice to and without the consent of the company, and leased the lower story of his store to the purchasers, occupying himself the second story and the cellar with the balance of his stock, which at the time of the fire exceeded in value the insurance obtained on his goods. *Held*, that he had not forfeited his right to indemnity by failing to give notice of the partial sale, but was entitled to recover the amount of his insurance, it being upon merchandise which was to be used for traffic, and not as property to be kept unchanged. *West Branch Ins. Co. v. Helfenstein*, 40 Penn. St. 289. 1861.

§ 54. A condition that, in case of a transfer or change of title in the property insured, the policy shall become void, is not violated by a lease of the property, which only changes the possession. *West Branch Ins. Co. v. Helfenstein*, 40 Penn. St. 289. 1861.

§ 55. The policy provided that the policy should cease at and from the time that the property thereby insured

should "be levied on, or taken into possession or custody under any proceeding in law or equity." *Held*, that the fact of the sheriff's going to the property and giving notice of a levy to the owner of goods, though good and effectual as between the debtor and creditor, was not a violation of the above provision of the policy, so long as the sheriff did not take actual possession, or leave a watchman in charge of the premises. The phrases "levied on," and "taken into possession or custody," reasonably construed, as it may be supposed was intended by the contracting parties, have the same meaning. *Commonwealth Ins. Co. v. Berger*, Supreme Court, Pa. at Philadelphia. 1862.

§ 56. Although a policy of insurance contains a clause prohibiting "any transfer of the interest of the insured, by sale or otherwise," without the consent of the insurer, yet a deed made by the insured, conveying the goods to assignees in trust, to pay creditors, will not render the policy void, the insured retaining the actual possession of the goods. *Phoenix Ins. Co. v. Lawrence*, 4 Metc. Ky. 9. 1862.

§ 57. The constructive possession of a sheriff, by virtue of the levy of an execution upon goods which have been insured, where the insured retains the actual possession, will not vitiate the policy, although a conveyance which terminated the interest of the insured in the goods would have that effect. *Phoenix Ins. Co. v. Lawrence*, 4 Metc. Ky. 9. 1862.

§ 58. A policy of insurance containing a condition that, "in case of any sale, transfer, or change of title in the property insured, such insurance shall be void and cease," is avoided by a conveyance which is absolute in form, though given as security for a debt merely; and this, though only an undivided interest in the property insured is conveyed. *Western Massachusetts Ins. Co. v. Riker*, 10 Mich. 279. 1862.

§ 59. A policy of insurance in favor of a firm, containing a clause declaring it to be void in case of "a sale of

the property insured, without the consent of the insurers," is not annulled by a release by one partner of all his interest to the other. *Hoffman v. Ætna Fire Ins. Co.* 1 Robert. N. Y. 501; S. C. 19 Abb. Pr. 235. 1863.

This case was affirmed on appeal, in 1865. See 32 N. Y. 405.

§ 60. A fire policy taken out from a mutual company by a mortgagor of a house, upon his interest in it, though assigned with the assent of the company to the mortgagee, is avoided by a quit-claim deed by the mortgagor of all his interest in the land to the mortgagee, executed after the assignment and before the loss, the policy never having been ratified and confirmed by the company, and the charter providing that, upon the alienation of a house insured, "by sale or otherwise," the policy shall be *ipso facto* void, unless ratified and confirmed to the alienee. *Hoxsie v. Providence Mut. Fire Ins. Co.* 6 R. I. 517.

§ 61. Where a policy of insurance is issued to A & B as partners, on property owned by them, containing a provision that if the property be "sold or conveyed without the consent of the insurance company obtained in writing on the policy, it shall be void;" a sale and conveyance of A's interest in the property to his partner B, without such consent, avoids the policy; but the forfeiture of the policy occasioned thereby may be waived by the insurance company, and the policy continued in force. *Keeler v. Niagara Fire Ins. Co.* 16 Wis. 523. 1863.

§ 62. A mortgage is not such an alienation of property as will defeat a policy of insurance which provides that if the property insured is alienated, the policy shall be void. *Smith v. Monmouth Mut. Fire Ins. Co.* 50 Me. 96. 1863.

§ 63. A chattel mortgage given upon goods covered by a policy of insurance upon a stock of merchandise, including goods sold but not delivered, without parting with

their possession or the right of possession thereto, will not avoid such policy, although one of its printed conditions provides that "in case of any transfer or termination of the interest of the insured in the property, by sale or otherwise—the policy shall be void;" and "that in case of any sale, alienation, transfer, or change of title in the property insured, or of any individual interest therein, such insurance shall be void; and the entry of a foreclosure of a mortgage, or the levy of an execution, or an assignment for the benefit of creditors, shall be deemed an alienation of the property." The meaning of the words "sale, alienation or transfer," in such condition is to be confined to acts which absolutely divest the title of the insured. *Van Deusen v. Charter Oak Fire & Marine Ins. Co.* 1 Robert. N. Y. 55. 1863. Same Case, 1 Abb. Pr. N. S. 349.

§ 64. Where a policy of insurance upon the interest of a mortgagor was to be void if the estate should be alienated or incumbered by sale, assignment, or otherwise, and his right to redeem the property was seized and sold on a writ of execution; *Held*, that the sheriff's sale to a third person of the right of redemption was an incumbrance upon the property; and if the title thus acquired should be perfected by lapse of time, it would constitute an alienation of it. *Campbell v. Hamilton Mut. Ins. Co.* 51 Me. 69. 1863.

§ 65. When a policy of insurance was to be void if there should be any alienation or change in the title, any material change, though not by alienation, will have that effect.

Thus, where the plaintiff obtained insurance on an undivided half of a dwelling house, and afterwards, on the petition of his co-tenant, partition was made on judgment rendered therefor, it was held to be equivalent to an alienation and a purchase. *Barnes v. Union Mut. Fire Ins. Co.* 51 Me. 110. 1863.

§ 66. A fire policy taken out from a mutual company by a mortgagor of a house upon his interest in it, though

assigned with the assent of the company to the mortgagee, is avoided by the assignment of the mortgagor of all his interest in it for the benefit of his creditors, though made without the assent or knowledge of the mortgagee—the charter providing that “if the said property (insured) shall be sold or conveyed in whole or any part, then this insurance shall be void and of no effect.” Nor will the fact that assessments have been made and collected upon the premium note of the insured after the alienation of the premises insured, but in ignorance of such alienation, operate as a waiver of the forfeiture of the policy under the above condition. *Hazard v. Franklin Mut. Fire Ins. Co.* 7 R. I. 429. 1863.

§ 67. Where by one of the conditions of a policy of insurance, it was provided “that, in case of any sale, transfer or change of title of any property insured by this company, or of any undivided interest therein, such insurance shall be void and cease; *Held*, that a sale and transfer by one partner to one of his co-partners, of his interest in the partnership property, without the consent of the company, and before the loss occurred, avoided the policy, and that it was not material that such sale and transfer was made without the assent of another partner. *Hartford Fire Ins. Co. v. Ross*, 23 Ind. 179. 1864.

§ 68. Where an assured, having an insurable interest at the time the policy is issued, alienates the property and retains no interest therein, the policy, as to him, is at an end; but if an interest is still retained, the policy in the absence of special stipulations to the contrary will cover and protect that interest. *Ayres v. Hartford Fire Ins. Co.* 17 Iowa, 176. 1864.

§ 69. Where a policy which by its terms was to become void upon an alienation of the property insured not assented to by the company, was to continue so long as the yearly payments stipulated therein, were made, and one of the partners of the firm insured, sold and trans-

ferred his interest in the property insured to his co-partner, who continued for several years thereafter to make the yearly payments required by the policy to the treasurer, the authorized agent to receive them, but no notice of the sale of the partnership interest was regularly given, nor any transfer of the policy executed to the purchaser; *Held*, that the policy did not necessarily become void; but that the facts were evidence, to be submitted to the jury upon the question whether the state of the policy was known to the company; and, if so, their receipt for the annual premiums for four years after the assignment, tended to show an acquiescence in the alienation, a waiver of the forfeiture, and consequently an estoppel. *Buckley v. Garrett*, 47 Penn. St. 205. 1864.

§ 70. A provision in a policy of insurance that it should become void upon a sale or transfer of property insured, unless the policy was also transferred to the purchaser, and the transfer accepted by the president or secretary of the company within twenty days after the sale or transfer, or before a fire, does not apply to a case where the assured has parted with his interest in the policy by an assignment approved by the company. *Buckley v. Garrett*, 47 Penn. St. 204. 1864.

§ 71. A transfer by one tenant in common to his co-tenant, or from one partner to another, will avoid a policy which provides that alienation by sale or otherwise shall forfeit the policy. *Buckley v. Garrett*, 47 Penn. St. 204. 1864.

§ 72. Where a policy provides that upon any sale, transfer or change of title in the property, the insurance shall cease; a merely nominal transfer, as collateral security for debts which are subsisting liens upon the property, will not avoid the policy; but a transfer which lessens the interest of the assured in preventing a destruction of

the property will avoid it. *Ayres v. Hartford Fire Ins. Co.* 17 Iowa, 176. 1864.

§ 73. The effect of the usual proviso against sales in policies of insurance is not to interdict sales of the owners as between themselves, but only sales of proprietary interests by the parties insured, to third persons. *Hoffman v. Aetna Fire Ins. Co.* 32 N. Y. 405. 1865.

§ 74. Where a policy of insurance on chattels contains a clause that "in case of any sale, transfer or change of title in the property insured such insurance shall be void and cease." The execution of a chattel mortgage on the property by the insured to a third person, without notice to the insurance company, or their assent obtained, will avoid the policy. *Tallman v. Atlantic Fire and Marine Ins. Co.* 29 How. N. Y. 71. 1865.

§ 75. Where a policy provided that "in case of any sale, transfer or change of title in property insured, or of any undivided interest therein, the insurance thereon should be void and cease;" *Held*, that an assignment as collateral security was not a "sale, transfer or change of title," within the meaning of the policy. *Ayres v. Hartford Ins. Co.* 21 Iowa, 198. 1866.

§ 76. A policy of insurance stipulated that the policy should be made void if the property should be sold or conveyed, or the interest of the parties therein changed; *Held*, that a merely nominal conveyance, without an actual change of interest, would not avoid the policy; that an assignment of a title-bond held by the insured to a lien holder to secure him for advancing the purchase money stipulated to be paid to the obligor in the bond by the assured, and also to secure the payment of a judgment which was a lien upon the property older than the policy of insurance, if it did not increase the interest of such assignee and lien

holder and decrease the interest of the party insuring, did not change the interest of such assured so as to defeat the policy. *Ayres v. Home Ins. Co.* 21 Iowa, 185. 1866.

See Assignment, § 1, 5, 6, 7, 9, 19, 26. Burden of Proof, 6. Certificate, 9. Encumbrance, 28. Insurable Interest, 11. Interest in Policy, 17. Lien, 5, 6. Other Insurance, 54. Parol Contract, 4, 7. Parol Evidence, 11. Responsibility of Assignee for acts of Assignors, 3, 9. Title, 55. Use and Occupation, 20. Who may sue, 4, 27.

ALTERATION.

§ 1. An alteration or enlargement of a building will not avoid the policy, unless the risk be thereby increased; which must be determined by the jury. *Curry v. Commonwealth Ins. Co.* 10 Pick. Mass. 535. 1830. *Stetson v. Massachusetts Mutual Ins. Co.* 4 Mass. 330. 1808.

§ 2. Where there had been an alteration of the "stove and smoke pipe," the judge instructed the jury, that, if the alteration increased the risk, the policy would be void. *Held*, that this instruction was correct. *Jones Manufacturing Co. v. Manufacturers Mut. Ins. Co.* 8 Cush. Mass. 82. 1851.

§ 3. A by-law of a company, providing that, "in case of any alteration, application may be made, to have the premises examined in order to be ascertained and certified whether the risk be thereby increased or not," need not be complied with by assured before a suit for a loss; he may take the risk of that question before a jury. *Perry County Ins. Co. v. Stewart*, 19 Penn. St. 45. 1852.

§ 4. Where a by-law required notice within a specified time, of any alterations tending to increase the risk, and alterations were made, but no notice thereof was given to the company; *Held*, that the question, whether certain alterations and additions made to the insured property increased the risk, was for the jury to determine. *Schenck v. Mercer County Mut. Ins. Co.* 4 Zab. N. J. 447. 1854.

§ 5. Under a provision in the charter against "alterations by the act of the proprietor, without additional premium," &c. ; *Held*, that an alteration made by a tenant, without the consent or authority of the proprietor, would not avoid the policy; and it was a question for the jury to determine, how far the proprietor had authorized the alteration made by the tenant. *Padleford v. Providence Mut. Ins. Co.* 3 R. I. 102. 1855.

See Increase of Risk. Warranty and Representation, § 29. What Property is covered by the Policy, 25.

APPLICATION.

§ 1. Application of the assured consisted of a letter and "diagram of the situation of the buildings surrounding the one to be insured," and was referred to in the policy, but not in express terms made a part of the contract. *Held*, that such general reference did not make the application a part of the policy, so as to amount to a warranty of the representations therein contained. *Stebbins v. Globe Ins. Co.* 2 Hall, N. Y. 632. 1829.

§ 2. A survey of buildings, occupied and used as a china factory, was filed in the office of the Eagle Insurance Company, and described a certain room in the premises as a "store room for painted ware," &c. Defendants issued a policy on same property, and referred to said survey in Eagle office in general terms "as described in report No. 5306, filed in the office of the Eagle Company." A loss afterwards occurred, and it was in proof that the room referred to in the survey as a "store room for painted ware," was not then, nor never had been used as such, but was occupied by the carpenter of the establishment, who had his bench and tools there, made mouldings, shelves, racks, &c. for the factory; *Held*, that the mere reference to the survey was not to be considered as incorporating it in the policy, or making it equivalent to a warranty, but, at most, a representation which, if material and falsified, would vitiate the policy; but its materiality was a matter of defence, and, not having been proven by defendants to be material, assured might recover. *Delonguemare v. Tradesmen's Ins. Co.* 2 Hall, N. Y. 589. 1829.

§ 3. To make an application, the conditions or any other document, a part of the contract, there must be an express stipulation that the policy was made and accepted

in reference to such other document or paper. An application describing a building is not a warranty, unless thus referred to in the policy. *Jefferson Ins. Co. v. Cotheal*, 7 Wend. N. Y. 72. 1831.

§ 4. The description in the application, when it is only referred to, but not expressly made a part of the contract, may vary considerably from the actual state of the property at time of the loss; but if not fraudulently intended, risk was not increased, or rate not changed by it, the policy would not be avoided. *Jefferson Ins. Co. v. Cotheal*, 7 Wend. N. Y. 72. 1831.

§ 5. In a policy on merchandise in a building occupied by the applicant and others, the building was referred to as "more particularly described in the application and survey furnished by assured, filed No. 928, in the office of the Insurance Company." *Held*, that the survey, notwithstanding the reference to it in the policy, (not having been expressly made part of the policy,) was a representation merely, and not a warranty, and that the plaintiff was entitled to recover, although there was a variance between the survey, in saying that a stone partition run through the building, and extended up to roof of same, and proof on the trial, that said partition only extended up to the first floor, and side walls of the building rose five feet higher. *Snyder v. Farmers' Ins. & Loan Co.* 13 Wend. N. Y. 92. 1834. *Affirmed*, 16 Wend. N. Y. 481. 1836.

§ 6. The various answers contained in an application, and referred to in the policy as "representations," are rather to be regarded as having the legal effect of representations, than of warranties, as understood in the law of marine insurance, though partaking of the character of both; and it is sufficient, if they are made in good faith and are substantially correct, as to existing circumstances, and substantially complied with, so far as they are executory, and regard the future. *Houghton v. Manufacturers' Mut. Fire Ins. Co.* 8 Met. Mass. 114. 1844.

§ 7. There was this proviso in the policy: "If the representations made" (in the application) "do not contain a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured, so far as the same are known to the applicants, and are material to the risk, this policy shall be void." *Held*, 1st, that the policy, by the manner in which it refers, in terms, to the application and representations, does legally adopt and embody them as part of the contract, to the same effect as if they were recited and set forth at large in the policy. 2d, that the application and answers, being termed "representations," in the policy, are to be regarded as having the legal effect of representations rather than warranties; and the fact stated must be substantially true and correct, and, so far as executory, must be substantially complied with, and to this extent are conditions precedent; but an exact and literal compliance is not required as in the case of warranties. *Houghton v. Manufacturers' Mut. Fire Ins. Co.* 8 Met. Mass. 114. 1844.

§ 8. Under a condition in the policy, that it shall be void if the application does not contain a just, true, and full exposition of all the facts, "so far as known to the applicant," it is not true, as an inference of law, that the applicant is presumed to know all the facts, because he is owner of the estate. This question of knowledge is one of fact, to be left to the jury upon the evidence. *Houghton v. Manufacturers' Mut. Fire Ins. Co.* 8 Met. Mass. 114. 1844.

§ 9. Where two sets of representations are made to the agent of the insurance company by the insured, and the policy was granted on one set, the other was held to be inadmissible to affect the insured, he being only bound by the set given for the policy issued. *Nicoll v. American Ins. Co.* 3 Wood. & Min. C. C. U.S. 529. 1847.

§ 10. The statements of the application and survey not deemed warranties, although expressly referred to in the policy as forming part thereof. *Kentucky & Louisville Mut. Ins. Co. v. Southard*, 8 B. Monroe, Ky. 634. 843.

§ 11. Where the conditions annexed to a policy, but not in express terms referred to, provided that "in all cases the insured will be bound by the application, for the purpose of taking which the surveyor will be deemed the agent of the applicant as well as of the company;" *Held*, that the surveyor taking the application was the agent of both parties, but as the application was the act of the plaintiffs, they were affected by any omission of the surveyor. *Sexton v. Montgomery County Mut. Ins. Co.* 9 Barb. N. Y. 191. 1848.

§ 12. A policy of insurance contained the following clause, immediately after a brief description of the property insured: "Reference being had to the application of the said K. for a more particular description and forming a part of this policy." Defence was, that because the word "and" was used instead of the word "as," the application was not part of the contract. *Held*, that the application was part of the contract, and the reference sufficient to make it such. *Egan v. Mutual Ins. Co. of Albany*, 5 Denio, N. Y. 326. 1848.

§ 13. A mere reference to the application does not make it a part of the contract, unless expressly stated. *Wall v. Howard Ins. Co.* 14 Barb. N. Y. 383. 1852.

§ 14. *Held*, that a reference to survey was, in effect, incorporating it entire in the contract, though not in express terms made part of the contract; and that all the answers, applicable to the subject matter insured, were obligatory on the insured. *Sheldon v. Hartford Fire Ins. Co.* 22 Conn. 235. 1853.

§ 15. The application is to be taken as part of the contract of insurance, in the same manner it would be if incorporated in the policy itself. *Philbrook v. New England Mut. Fire Ins. Co.* 37 Me. 137. 1853.

§ 16. The policy declared that it was "made and accepted in reference to the terms and conditions hereto annexed, which are to be used and resorted to, in order to explain the rights and obligations of the parties hereto, in all cases not otherwise specially provided for." One condition provided, that "if any person insuring any building or goods in this office shall make any misrepresentation or concealment, &c., such insurance shall be void, and of no effect." *Held*, that the statements of the application were to be treated as representations, and not warranties. The leaning of courts is, to hold stipulations to be representations rather than warranties, in all cases where there is room for construction. *Daniels v. Hudson River Fire Ins. Co.* 12 Cush. Mass. 416. 1853.

§ 17. The agent of the company made the survey, and put in the value of the building, as given by the applicant, who signed the application, and judge in lower courts instructed the jury that they might find that the defendants made a survey of the premises, and that, therefore, they were responsible for its correctness as to value, &c.; *Held*, that such instruction was erroneous. *Protection Ins. Co. v. Hall*, 15 B. Monroe, Ky. 411. 1854.

§ 18. Although a policy provided that the "conditions were to be resorted to, to explain the rights and obligations of the parties," &c., yet in an action by the assured on such policy on woolen factory; *Held*, that the assured might show the knowledge of the agent of the insurance company of the character of the property, that the description was prepared by such agent, and that the omissions, in the policy, complained of by the company, were made by the agent, because he considered them im-

material; and therefore the validity of the policy did not depend on the completeness of the written description, as another clause in the policy provided that the "Company would be liable for the correctness of surveys and valuations made by its agent." *Howard Ins. Co. v. Bruner*, 23 Penn. St. 50. 1854.

§ 19. Where an agent of the company, as well acquainted with the premises as the assured himself, filled up an application and had the assured sign it; *Held*, that the assured was not responsible for any misrepresentations in such survey. *Roth v. City Ins. Co.* 6 McLean, C. C. U. S. 324. 1855.

§ 20. A policy of insurance upon a stock of store goods, provided "That a false description by the assured of a building or its contents, or omitting to make known any fact or feature in the risk which increases the hazard of the same, shall render absolutely void a policy issued on such description. Such survey, plan or description shall be taken to be a warranty on part of assured, and that company would not be liable for loss occasioned by the use of fires in buildings unprovided with a good, substantial stone or brick chimney." At foot of the application the insured stipulated "that any misrepresentation in effecting this insurance shall be deemed not only a sufficient cause for cancelling my policy, but render the insurance void." The store was described as containing "one chimney, one stove, stove well secured, pipe passes through crock well secured;" whereas there was no chimney and no crock whatever. The day after a fire was first kindled in the stove, the store burned down. *Held*, 1st, that the plaintiff, knowing the representation to be false, assumed the responsibility of it; 2d, that evidence that the agent of the company, who was only authorized to receive and forward applications, knew of the true condition of things, and agreed with the plaintiff that the chimney should be built and pipe secured before a fire was built, and then represented them in application as already existing, was

not competent; the obtaining of the policy under such false description was in fraud of the company, and, being done with the concurrence and for the benefit of the plaintiff, he could not recover. *Held* further, that even if competent, the plaintiff's position would not be improved, as the agreement was never communicated to the company, and was not within the authority of the agent without such communication and approval, and besides, if made, had been violated by the plaintiff, by building a fire before the chimney had been built or the pipe secured. *Smith v. Insurance Co.* 24 Penn. St. 320. 1855.

§ 21. Where premises insured against loss by fire have been thoroughly examined by the agent of insurers, it is conclusive upon the insurers as to whatsoever is apparent. *Michael v. Mutual Ins. Co. of Nashville*, 10 La. An. 737. 1855.

§ 22. Where to an application was appended the clause, "the applicant covenants and agrees that the foregoing is a correct description of the property so far as regards the value and risk of the same;" *Held*, that the answers to the interrogatories were warranties that the description was correct, so far as regarded the "value and risk" only. *Lindsay v. Union Mut. Ins. Co.* 3 R. I. 157. 1855.

§ 23. In an application on October 14th, a bleaching and dye factory was treated and described as being complete, and on December 8, following, when policy was taken and premium paid, the agent put on policy this endorsement: "These buildings are in course of construction." Although the application was referred to in policy and made a part thereof and warranty on part of assured; *Held*, that the policy must be taken as "upon buildings in course of construction." *Gloucester Manuf. Co. v. Howard Fire Ins. Co.* 5 Gray, Mass. 497. 1855.

§ 24. If the application is referred to in the policy "as forming a part thereof," it becomes a part of the contract and warranty. *Burritt v. Saratoga County Mut. Ins. Co.* 5 Hill, N. Y. 188. 1843. *Kennedy v. St. Lawrence County Mut. Ins. Co.* 10 Barb. N. Y. 285. 1851. *Williams v. New England Mut. Fire Ins. Co.* 31 Me. 219. 1850. *Battles v. New York County Mut. Fire Ins. Co.* 41 Me. 208. 1856.

§ 25. The applicant having previously answered that the buildings and machinery both belonged to one person—himself—except certain specified machinery, which he stated belonged to one H., and was not to be insured in this policy, and having also previously answered that the "works" were not operated on account of the "proprietors," but were rented, was then asked: "Are they (the works) immediately superintended by one of the proprietors?" to which he answered, "Yes;" the fact being, as was proved, that they were superintended by the same H., who rented the works of the applicant and who was "the proprietor" named in the answer to a previous question of a part of the machinery operated in those very works; *Held*, that there was no misrepresentation, and that as the ambiguity grew out of the shape of the questions in the application, it was chargeable to the company who prepared them. *Wilson v. Hampden Fire Ins. Co.* 4 R. I. 159. 1856.

§ 26. The assured is responsible for the truth of representations in his application, if signed by his agent, although the agent signed it in blank and left it to be filled up by the company or one of the company's officers, unless the jury should find that defendants had exceeded the implied authority conferred upon them by the assured, by sending them the application in blank. If they had exceeded their authority, then to that extent, and no further, the assured were absolved from all responsibility for the representations contained in the application. The signature and authority of assured's agent being admit-

ted, any evidence to show that it was not their application, would be incompetent. *Liberty Hall Association v. Housatonic Mut. Fire Ins. Co.* 7 Gray, Mass. 261. 1856.

§ 27. The issuing a policy upon application in which one or more questions are unanswered, is a waiver on the part of the company of such answers, although the assured has answered negatively another interrogatory, "If there are any other circumstances affecting the risk, state them," this being held to cover only such facts as had not already been specially inquired about. *Liberty Hall Association v. Housatonic Mut. Fire Ins. Co.* 7 Gray, Mass. 261. 1856.

§ 28. When risk is taken on faith of representations made by insured, he is required truly and completely to express his knowledge of the dangers to which the property is exposed, and the contract will be void if he does not; but where the insurers depend on their own knowledge, the representations of the insured are immaterial, though a withholding of information increasing the risk would be in bad faith and would avoid the contract. As to these matters the insured, even in a mutual company, deals with the company as a stranger. Where agent examines and describes the property, it will not be presumed that the application, which merely individuates the property, was intended as a representation of the hazards. *Cumberland Valley Mut. Protection Co. v. Schell*, 29 Penn. St. 31. 1857.

§ 29. Where the surveyor of an insurance company, made the survey of the buildings to be insured, and filled up the application for assured to sign, and assured signed it without examination upon the representation of the agent, that he had authority to do these things, and, in a suit upon the policy, the authority of the agent was not denied by the company; *Held*, that assuming that the acts of the surveyor or agent were within the scope of

his authority, it was the same as if done by the company itself, and though the statements contained in such application, as to the distance of other neighboring buildings, may have been untrue, the company were estopped from showing such to be the case. *Plumb v. Cattaraugus County Mut. Ins. Co.* 18 N. Y. 392. 1858.

§ 30. An application for insurance on property in a certain building omitted to state that there was a steam engine in the building. By the rules and regulations of the company, a printed copy of which was attached to the policy, buildings in which steam power was employed were excepted from those that should be insured. The application was drawn by an agent who knew of the steam engine. *Held*, that where an application was unintentionally defective, on a point well known to the agent, the company, and not the insured, should be the sufferers. *Campbell v. Merchants & Farmers Mut. Fire Ins. Co.* 37 N. H. 35. 1858.

§ 31. The application was referred to and made part of the policy, and stipulated, over signature of assured, that, "it was a full, just and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property, as far as the same are material to the risk." The reply to question, as to when premises were worked, was, "the premises are constantly worked." *Held*, that this was to be understood as representation that the premises were to be constantly worked, during the usual and customary working hours and days for the prosecution of the business for which they were employed. *Held*, also, that a misdescription of the quarter section on which the mill stood, was not material to the risk, and did not avoid the policy. *Prieger v. Exchange Mut. Ins. Co.* 6 Wis. 89. 1858.

§ 32. In an application for insurance, made part of policy and warranty on part of assured was this stipula-

tion, above the signature of assured: "And the applicant covenants and agrees with the said company, that the foregoing is a correct description of the property requested to be insured, so far as regards the condition, situation, value, title and risk on the same; that he holds himself bound by the act of incorporation and by-laws of the said company;" and "that the misrepresentation or suppression of material facts shall destroy his claim for damage or loss." *Held*, that the whole application must be construed together so as to give effect to all its parts, and that assured was to be held responsible for the accuracy of his answers only so far as they were material to the risk; their materiality to be determined by the jury. *Elliott v. Hamilton Mut. Ins. Co.* 13 Gray, Mass. 139. 1859. See also, *Richmondville Union Seminary v. Hamilton Mut. Ins. Co.* 14 Gray, Mass. 459. 1860, which following above decision, holds, that an omission to mention, in the application, a building situate within the required distance, will not avoid the policy, unless the existence of such building is material to the risk.

§ 33. An application made by a third person, not on its face purporting to have been made by the plaintiff, or on his behalf, nor signed by him, and where there is no evidence that its contents were assented to or known by plaintiff, is not binding on him. And though policy stipulated "that the contract was made and accepted with reference to a survey on file in the office of the company," the plaintiff is not thereby chargeable with constructive notice of any statements or representations, of a promissory or executory nature embraced in the application. *Denny v. Conway Stock & Mut. Ins. Co.* 13 Gray, Mass. 492. 1859.

§ 34. The word "survey" in a policy of insurance imports only a plan and description of the present existing state, condition and mode of use of the property. *Denny v. Conway Stock & Mut. Ins. Co.* 13 Gray, Mass. 492. 1859.

§ 35. Where application was referred to in policy as forming a part thereof and warranty on the part of assured, and such application contained, at the bottom of the written answers, the following clause: "And the said applicant hereby covenants and agrees that the above is a full, just and true exposition of all the facts and circumstances concerning the condition, situation and value of the risk so far as they are material;" *Held*, that the effect of any misrepresentations or concealments upon the part of the assured must be determined by their materiality. *Longhurst v. Conway Fire Ins. Co. U. S. Dis. Ct. Northern Division Iowa, October Term, 1861.*

§ 36. Where application was referred to in policy as forming a part thereof, and made a warranty on the part of the assured, and parol evidence was offered to show that the agent of the company, entrusted with blank policies and power to make contracts of insurance, filled up such application and obtained the signature of the assured without any knowledge on the part of the assured of the contents of such application; *Held*, that by signing the application the assured made it his, and became responsible for the statements therein contained; and evidence was therefore incompetent to show a knowledge on part of the agent of the facts misrepresented or concealed in such application. But where, upon trial, the defendants had introduced evidence to show a concealment of buildings within eight rods of the one insured, and required to be made known by the terms of the policy; *Held*, that the agent, who had filled up the application, might be allowed to testify as to the fact of his knowledge of the existence of such buildings, alleged to have been concealed. *Longhurst v. Conway Fire Ins. Co. U. S. District Court, Northern Division Iowa. October Term, 1861.*

§ 37. One who accepts a policy of insurance in which it is expressly provided that it is agreed and declared that the policy is made and accepted upon and in reference to

the application filed in the office, is thereby concluded from denying that the application is his, and cannot set up that it was made by an agent employed by him to procure insurance upon his property, but without authority to bind him by representations in the application. *Draper v. Charter Oak Fire Ins. Co.* Supreme Court of Mass. 1862. American Law Register of Pha. March, 1862.

§ 38. A policy of insurance expressed to be issued on property described in a certain application, "which is hereby declared to be a part of this policy, and a warranty on the part of the" assured, and to be "made and accepted in reference to the written and printed application whereon it is issued," is not void, if no written application was ever made; nor if issued upon a defective application, if that application was correct so far as it went. *Blake v. Exchange Mut. Ins. Co.* 12 Gray, Mass. 265. 1858.

§ 39. In an application, made part of a policy of insurance on property in the second story of a large building, and providing that the description therein given is a full and true description of the property to be insured, and of all circumstances in relation thereto, material to the risk, and that the questions not answered shall be construed most favorably to the risk, an omission in answer to the question, "Who occupies it?" to state the occupation and occupants of all the rooms, does not avoid the policy, if the jury are satisfied that those not disclosed make the risk less hazardous than it would have been if the whole building had been occupied as stated in the answer. *Haley v. Dorchester Mut. Fire Ins. Co.* 12 Gray, Mass. 545. 1859.

§ 40. An insurance company issuing a policy at the instance of another company to whom the original application for insurance was made, or at the instance of the broker employed by the latter to examine the premises, are

not chargeable with notice of material facts, known to the latter company and the broker, but not communicated to the former. *Salms v. Rutgers' Fire Ins. Co.* 8 Bosw. N. Y. 578. 1861.

§ 41. Where a policy refers to the application for a description of the property insured, the application must be regarded the same as if incorporated into the policy itself. *Gahagan v. Union Mut. Ins. Co.* 43 N. H. 176. 1861.

§ 42. Where it was stipulated in a policy against fire that the same was made and accepted in reference to conditions annexed, which were to be used and resorted to in order to explain the rights and obligations of the parties, and one of the conditions was that, if the policy should be made and issued upon a survey and description of the property insured, such survey and description should be taken and deemed to be a part and portion of such policy and a warranty on the part of the assured; *Held*, that a written application signed by the assured, containing a survey and description, was a warranty and not a mere representation, and that if the survey and description was false, no recovery could be had upon the policy. *Ætna Ins. Co. v. Grube*, 6 Minn. 82. 1861.

§ 43. Where the statements of an application are a warranty, a policy will be rendered invalid if, in reply to a question in the application calling for the amount of incumbrance upon the property, and a full and accurate statement of the true title and interest, the answer is that the property is mortgaged for \$6,600, when it is in fact mortgaged for \$6,684; and if, in reply to the question, "How are the several stores occupied? state fully, giving the tenants," the answer is, "See plan," and the plan referred to does not disclose the names of all the tenants. *Abbott v. Shawmut Fire Ins. Co.* 3 Allen, Mass. 213. 1861.

§ 44. The written application for insurance which usually precedes the execution of a policy, does not constitute a part of the contract of insurance, in such sense as to require it to be filed as part of the foundation of the suit. *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352 1862.

§ 45. A mere indication in the policy of the place where the application, which usually precedes the execution of a policy, could be found on file, does not make it a part of the policy. *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352. 1862.

§ 46. If an application for insurance to a mutual fire insurance company is expressly made a part of the policy, and contains a clause inserted after the printed questions, by which the applicant covenants that "the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant, or are material, and on all the facts inquired for;" the omission to disclose several buildings within one hundred feet of the property insured, in reply to a question, "What is the distance and direction from each other, and from other buildings within one hundred feet, and how are such other buildings occupied? Make plan on back hereof, showing the relative position of all the buildings," will avoid the policy, although such omission is not material, and the application also contains a provision that the applicant further agrees that "the misrepresentation or suppression of material facts shall destroy his claim for damage or loss," and an article of the by-laws, subject to which the policy was issued, provides that "any policy issued by this company shall be void, unless the assured shall have made in his application for insurance a true representation of the risk." *Hardy v. Union Mut. Fire Ins. Co.* 4 Allen, Mass. 217. 1862.

§ 47. If, prior to the passage of Massachusetts Statute of 1861, c. 152, a policy of insurance was issued under the conditions and limitations expressed in the by-laws of the insurance company, one of which was that, when any property insured should be taken possession of by a mortgagee, the policy should be void, and the application, which was expressly made a part of the policy, contained an agreement that if the answers therein did not give a full, just and true exposition of all the facts and circumstances in relation to the condition, situation, value and risk of the property to be insured, the policy should be void, the omission to disclose in the application the fact that possession of the premises to be insured had been taken under a second mortgage thereof, and a subsequent re-taking of possession under the same mortgage, without the consent of the underwriters, will avoid the policy. *Jacobs v. Eagle Mut. Fire Ins. Co.* 7 Allen, Mass. 132. 1863.

§ 48. A description of premises sought to be insured in the application, in reference to the uses to which they are then being applied, is not to be regarded as a warranty that they shall not be used during the existence of the policy, for any other purpose. The application is a mere representation of the assured, and he is not bound to set it out and prove its truth. Its falsity is a matter of defence. *New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221. 1863.

§ 49. Under the Massachusetts statute of 1861, which provides that "in all insurance against losses by fire the conditions of the insurance shall be stated in the body of the policy, and neither the application of the insured nor the by-laws of the company, as such, shall be considered as a warranty or part of the contract," an express condition in the body of a policy that the application contains a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property, so far as the same are known to the insured, and material to the risk, will avoid the policy in

case the application contains material misrepresentations in those respects. *Barre Boot Co. v. Milford Mut. Fire Ins. Co.* 7 Allen, Mass. 42. 1863. *Campbell v. Charter Oak Fire & Marine Ins. Co.* 7 Allen, Mass. 45, note. 1863.

§ 50. When the agent of an insurance company has authority only to receive and forward applications for insurance, parol evidence is not receivable to show that the agent failed, in writing the application, to take down the statements made by the applicant, or changed them. But if the agent is empowered to pass upon, and did pass upon the risk in question, without submitting it to his principal, and failed to correctly take down the facts stated by the applicant, in ignorance of which the application was signed, in the absence of any stipulation in the policy to the contrary, the principal is estopped from asserting that he has been misled by the representations of the application. *Ayres v. Hartford Fire Ins. Co.* 17 Iowa, 176. 1864.

§ 51. Where a policy contains no covenant making the answers of the assured to questions in the application warranties, the answers are representations only, and a mistake or false answer does not necessarily avoid the policy. *Columbia Ins. Co. v. Cooper*, 50 Penn. St. 331. 1865.

See Agent, § 15, 21, 30, 36, 37, 66. By-laws and conditions, 3, 4. Concealment, 10, 19. Construction, 9. Description of Property, 8, 11, 13. Distance of Other Buildings, 5, 7, 11, 12, 14, 17, 18, 19, 20, 22. Encumbrance, 6, 8, 9, 12, 14, 20, 22, 26, 27, 31, 32, 36, 37, 38. Other Insurance, 39. Parol Evidence, 3, 7, 14, 15, 17, 29. Pleading and Practice, 52. Reform of Policy, 4. Title, 41, 45. Two-thirds or Three-fourths clause, 4. Use and Occupation, 16, 17, 18, 49. Value, 5. Waiver, 9. Warranty and Representation, 5, 14, 16, 22, 23, 30, 39. Watchman, 6.

ARBITRATION.

§ 1. Stipulation of policy, that in case of any loss or dispute, it should be referred to arbitration. Declaration showed that there had been no reference. *Held*, that the agreement of the parties could not oust the Court, though if there had been any reference, or any was pending, it might be a bar. *Kill v. Hollister*, 1 *Wilson*, 129. 1746.

§ 2. Under the clause or condition in policies of insurance, that in case of any dispute between the parties it may be submitted to arbitration, &c.; *Held*, that the courts are not ousted of their jurisdiction, nor can they compel the parties to submit to a reference in the progress of a suit, when one of them have refused to submit to arbitration. *Scott v. Phoenix Assurance Co.* 1 *Stuart's Lower Canada*, 152. 1823. See also *Scott v. Avery*, 20 *Law & Equity*, 327. 1853.

§ 3. Condition that if any difference should arise upon any claim, it should be submitted to arbitration. The insurance office denied all liability, and the insured, claiming that the condition only required a reference as to amount, and did not apply to a case where objection was made to the right to recover altogether, brought an action on the policy. *Held*, that the action was maintainable. *Goldstone v. Osborn*, 2 *Carr. & Payne*, 550 (12 *E. C. L.* 726). 1826.

§ 4. Where a clause in policy provided for a reference to arbitrators of matters in dispute between company and assured, and company set up defence, that assured was bound, before instituting suit, to tender an arbitration. *Held*, that when the claim was made by plaintiff for the loss, if the defendant had offered to refer the question to arbitrators, the plaintiff would have been bound to accept

it; but on refusal of defendants to pay, without seeking to avail themselves of the right given by that article, the company must be considered as having waived it. *Millaudon v. Atlantic Ins. Co.* 8 La. 557. 1835.

§ 5. In a reduction by an insurance office of a submission and decree arbitral, whereby it was found that certain machinery destroyed by fire had been over-valued, it was averred, as a reason for reduction, that the insurance was fraudulently effected by the defender with the intention of destroying the property by fire and obtaining an exorbitant sum from the office. A corresponding issue was granted, and a verdict returned that the insurance was effected on a fraudulent over-valuation of the machinery, but not with the intention of destroying the same by fire. *Held*, that this was in substance a verdict for the defender, and that the pursuers had failed to establish the reason for a reduction. *Hercules Ins. Co. v. Hunter*, 15 Cases in the Court of Sessions, 800. 1837.

§ 6. An award provided that the assured should assign to the underwriter a policy taken in another company. *Held*, that, if it was on the same property, the provision was proper; and, if void, it did not avoid the balance of the award; and the insured might sue, though there had been no tender of performance. *Nichols v. Rensselaer Co. Mut. Ins. Co.* 22 Wend. N. Y. 125. 1839.

§ 7. A submission to an award, executed by authority of the board of directors, cannot be revoked by the president and secretary of the company, though the two latter were authorized by the charter to carry on the business without the presence of the board, subject to its rules, regulations, &c. Notice of the meetings of the arbitrators is immaterial, when both parties appeared at the trial. *Madison Ins. Co. v. Griffin*, 3 Ind. 277. 1852.

§ 8. The mortgagor and insured of stock of goods, cannot without consent of mortgagee, to whom policy is made

payable in case of loss, submit in a case of loss the amount of loss to arbitrators, so as to make their award binding upon mortgagee. *Held*, "that payable in case of loss to mortgagee," was an assignment in legal effect to the latter. *Brown v. Roger Williams Ins. Co.* 5 R. I. 394. 1858. *Brown v. Hartford Ins. Co.* 5 R. I. 394. 1858.

§ 9. A condition of a policy providing for the submission of any dispute or difference in respect to a loss, to arbitration, is not a bar to an action on the policy to recover a loss, unless such arbitration has been actually had. *Roper v. Lendon*, 1 Ell. & Ell. Q. B. 825. (102 Eng. C. L.) 1859.

See Assignment, § 12.

ASSESSMENTS.

§ 1. The charter provided for election of three directors, out of whom a president should be chosen by the members. Assessments resisted, because the directors were not elected prior to the election of a president. The objection was overruled and the assessment held valid. *Currie v. Mut. Assurance Society*, 4 Hen. & Munf., Va. 315. 1809.

§ 2. The original charter of 1794 provided for assessments upon all members, without distinction between town and country. Experience showing that the town losses were much the greater, at a request of a majority of the society, an act was passed in 1805, authorizing a division of the town and country risks into separate classes; each class to have its own assessment and bear its own losses. *Held*, that the act of 1805 was valid and binding, and that an assessment against the town class was binding on an original member, who came within that class. *Currie v. Mut. Assurance Society*, 4 Hen. & Munf., Va. 315. 1809.

§ 3. Under a Virginia statute requiring, in case of a sale of the property insured, the subscriber should give notice of the insurance to the purchaser, and assign the policy to him, and that the latter should be deemed a subscriber in the room of the original, and the property should still remain liable for quotas; *Held*, that the underwriter might recover a quota due against the purchaser, though the policy was not assigned, the provision of the law requiring an assignment being merely directory. *Mutual Assurance Co. v. Byrd*, 1 Va. Cases, 170. 1810.

§ 4. Quotas for a deficiency in funds may lawfully be assessed against those only, who were insured at the time

when the deficiency occurred. *Greenhow v. Buck*, 5 Munf. Va. 263. 1816.

§ 5. The declaration for insurance is a sealed instrument, and the act of limitations does not apply to an action for quotas. And a judgment for quotas, under a Virginia statute, may be had, on motion, against a purchaser of the property insured, as well as the original subscriber. And the $7\frac{1}{2}$ per cent. damages, to indemnify for expenses of collection, imposed by the rules of the corporation, is not usury, nor in the nature of a penalty, but stipulated damages, which may be recovered, with the quotas, on motion. *Stratton v. Mutual Assurance Society*, 6 Munf. Va. 22. 1827.

§ 6. Declaration for insurance by S., and afterwards there was a re-valuation and new declaration on same buildings by W. & T. The society filed the declarations and moved for judgment against S. & T. for quotas accruing after the re-valuation. Judgment rendered by default. *Held*, 1st, that the declarations were part of the record; 2d, that the judgment was erroneous, because S. was not liable for quotas after the re-valuation, and because T. was not jointly liable with S., and was jointly liable with W. *Shipworth v. Mutual Assurance Society*, 10 Leigh, Va. 502. 1839.

§ 7. A condition in a policy of a mutual insurance company, "that, if assured shall neglect for thirty days after notice to pay an assessment on his premium note, the policy shall be void," is valid and binding; and a non-compliance with it is a good defence to an action on the policy. *Beadle v. Chenango County Mut. Ins. Co.*, 3 Hill, N. Y. 161. 1842.

§ 8. The insured executed his premium note payable in such portions and at such times as the directors might, agreeably to their act of incorporation, require. At the great fire in Pittsburgh the company sustained losses, exceeding in amount the premium notes and other resources

of the company, together with the additional sum of one dollar on every one hundred dollars insured, which the company was authorized to assess. *Held*, that the company was bound to call in the whole amount of the premium notes and of the one per cent. additional at once, and to distribute the same *pro rata* among the losers. *Rhinehart v. Alleghany County Mut. Ins. Co.*, 1 Penn. St. 359. 1845.

§ 9. In a suit upon a premium note, given to a mutual company, to recover an assessment thereon, to pay a loss by fire; *Held*, that the maker, after aiding to put the corporation into action, and partaking of its benefits, could not now deny its legal existence, in order to escape from liability on his premium note. *Trumbull County Mut. Fire Ins. Co. v. Horner*, 17 Ohio, 407. 1848.

§ 10. Assessments need not be made on the premium notes of a mutual company at every loss, but should be made upon a rule approximating to it as near as is practicable and reasonable. *New England Mut. Ins. Co. v. Belknap*, 9 Cush. Mass. 140. 1851.

§ 11. By the provisions of the plaintiff's charter it was declared that every member of the company shall be bound to pay for losses, &c., "in proportion to the amount of his deposit note," and the 10th section provided that the directors, having ascertained the loss, "shall settle and determine the sums to be paid by the several members of the company, as their respective proportions of such loss, and that the sum to be paid by each member shall always be in proportion to the original amount of his deposit note or notes." *Held*, that the directors having ascertained that the company is liable for a loss, and that the company have not sufficient funds to pay such loss, are first to ascertain who were members of the company at the time the loss occurred, and having ascertained this, their assessment is to be made upon each, in the proportion which the amount of his deposit note bears to the aggregate

amount of all the deposit notes. The directors have no right to take into consideration the length of time any person has been a member, in determining the amount of his assessment, or whether he shall be assessed at all. If the directors have "omitted to assess the deposit notes of divers persons, then being members and liable for their proportion of the losses," thus increasing the amount of the defendants' assessment, or if they have included in the assessment the amount of previous assessments, from the payment of which the parties assessed have been released, the assessment is invalid. *Herkimer County Mut. Ins. Co. v. Fuller*, 14 Barb. N. Y. 373. 1852.

§ 12. In an action to recover an assessment on premium note, given to a company that had divided all its risks and notes into two classes, contrary to the general insurance law of 1849, in N. Y.; *Held*, that assured had a right to claim that all the premium notes held by the company should be assessed, before an assessment on his note could be recovered; as he was not limited to that class of risks in which his policy had been placed. *Thomas v. Achilles*, 16 Barb. N. Y. 491. 1853.

§ 13. The by-laws provided for a regular monthly meeting of the president and directors of the company. Article 22 of the By-laws was as follows: "To avoid the necessity of making an assessment in case of trifling losses, a majority of the directors are authorized to borrow such sum or sums of money as may be necessary. And in case an assessment be needed for any purpose, the directors shall have power to order such assessment, at any meeting called for the purpose." An assessment was levied at the regular monthly meeting, which was resisted because no notice was given of the purpose to levy assessments at that meeting. *Held*, that it was part of the ordinary business of the regular monthly meetings to order assessments when required, and that no notice was necessary. *Bay State Mut. Fire Ins. Co. v. Sawyer*, 12 Cush. Mass. 64. 1853.

§ 14. Assessments may be made, after expiration of policy, for losses happening while the insurance continued, and insured is not entitled to his premium note, until all the losses for which he was liable have been satisfied. *St. Louis Mut. Fire & Marine Ins. Co. v. Boeckler*, 19 Mo. 135. 1853.

§ 15. In an action on a premium note, to recover an assessment; *Held*, that in order to maintain the action, the plaintiffs were bound to show that legal assessments had been made by the directors, and for this purpose, to produce proper evidence of their act of incorporation and by-laws, so that it might appear that their provisions had been substantially complied with, in making the assessments. It was not enough to show actual assessments, leaving the defendant to prove that they were not in accordance with the act of incorporation and by-laws. *Atlantic Mut. Fire Ins. Co. v. Fitzpatrick*, 2 Gray, Mass. 279. 1854.

§ 16. It is not essential that a loss by fire shall have happened before an assessment upon premium notes could be lawfully made. *Kelly v. Troy Fire Ins. Co.* 3 Wis. 254. 1854.

§ 17. Where a mutual insurance company was authorized by an amendment to its charter to issue policies "for cash premiums," at the election of the applicant, which were to be taken in lieu of a deposit note, and the fund arising therefrom, together with the deposit notes, were declared to be the capital of the company for the payment of losses and expenses; *Held*, 1st, that the fund arising from cash premiums was subject to the same application as "premium notes," and could not be diverted to the payment of losses accruing before such premiums were received; and, 2d, that an assessment for the whole amount of losses accruing during the time such funds were received, made upon the deposit notes, without first exhausting the cash funds as provided by law,

was illegal and void. *Ohio Mut. Ins. Co. v. Marietta Woolen Factory*, 3 Ohio St. 348. 1854.

§ 18. Three companies, under a statute, united to form a fourth consolidated company, and the latter brought suit for assessments on a policy issued by one of the original companies. *Held*, that the action could not be maintained, without showing that the insured, by his vote in favor of consolidation, or by some fact stronger than mere silence, assented to the change. *Hamilton Mut. Ins. Co. v. Hobart*, 2 Gray, Mass. 543. 1854.

§ 19. A statute, amending the charter of a mutual insurance company, provided for a division of the risks, thereafter taken, into classes, when the property insured should amount to \$50,000, in each class, and then each class should bear its own losses. *Held*, that an assessment, based on a classification assigning less than \$50,000 to each class, was invalid. *Augusta Mut. Fire Ins. Co. v. French*, 39 Me. 522. 1855.

§ 20. Members of mutual companies, under the 11th section of the act of 1849, in N. Y., can only be made to pay in proportion to the original amount of their deposit note or notes, and can be made to pay no more, in the hands of a receiver, than could have been collected by the directors; nor can the liability of the members be increased by the insolvency of the company. Assessments must be made separately upon all premium notes in force at time of happening of each successive loss, unless two or more losses occur about the same time, when one assessment will answer for both. Nor can the receiver change this rule because the cash premiums paid the company have been expended in paying losses, and thereby lightened assessments on prior notes and left subsequent losses under the receiver to be paid wholly by assessments on notes then in force. Nor can any discrimination be made because some of the notes were ex-

ecuted for higher rates of premium than were charged by the company afterwards. *Shaughnessy v. Rensselaer Ins. Co.* 21 Barb. N. Y. 605. 1855.

§ 21. The Rochester Insurance Company made an assignment of all its assets, consisting only of premium notes; and the assignee, ascertaining that there was \$40,000 to \$50,000 losses due, made an assessment, including in such assessment \$4,500 for expenses of assignment, \$5,266 for costs, interest and expenses, and \$4,735 for costs of collection. *Held*, that the assignee could not levy assessments for these expenses, nor for losses. The power of levying assessments can be exercised only by the corporation or by a receiver; it cannot be transferred to an assignee. *Hurlburt v. Carter*, 21 Barb. N. Y. 221. 1855.

§ 22. An assignee of policy is liable on his promise to pay all future assessments on the policy, though the original deposit note had been surrendered to surety of the original insured, upon payment of assessments then due upon it, for losses occurring prior to assignee's membership in the company. *New Hampshire Mut. Ins. Co. v. Hunt*, 10 Fost. N. H. 219. 1855.

§ 23. Assessments are not invalidated by delay, not unreasonable, in making them; nor by small errors, if made in good faith; nor by variance, at different times, between cash premiums and deposit notes, as against members suffering no damage thereby. Whether there was sufficient data for making a correct assessment, is a question for the jury upon the whole evidence. *Marblehead Mut. Ins. Co. v. Underwood*, 3 Gray, Mass. 210. 1855.

§ 24. Each note is to be assessed in the proportion which it bears to aggregate of notes subject to assessment and collectable. *Bangs v. Gray*, 2 Kernan, N. Y. 477. 1855. *Reversing* 15 Barbour, N. Y. 264. 1853.

§ 25. Assessments are vitiated by intentional omission of some members, liable to assessment. *Marblehead Mut. Fire Ins. Co. v. Hayward*, 3 Gray, Mass. 208. 1855.

§ 26. Personal service is sufficient publication of notice of assessments. *Jones v. Sisson*, 6 Gray, Mass. 288. 1856.

§ 27. Assessments, covering interest on borrowed money, probable failures in collection, and 10 per cent. for expenses, are valid. So a reasonable reduction may be provided for, in case of prompt payment to the treasurer. *Jones v. Sisson*, 6 Gray, Mass. 288. 1856.

§ 28. In an action for assessments against two members of a mutual company, for losses occurring before one of them became a member; *Held*, that the assessment was valid as against the one who was a member at the time the loss occurred, but void as to the other, who was not a member at that time. *Long Pond Mut. Fire Ins. Co. v. Houghton*, 6 Gray, Mass. 77. 1856.

§ 29. Where a portion of the members of a mutual insurance company, denominated "first class policy holders," were intentionally omitted in making an assessment, and the assessment was laid only on those having policies coming within the designation of "second class," and where the plaintiffs did not show that they were legally entitled thus to divide their policies into classes; *Held*, that the whole assessment was thereby invalidated. *People's Equitable Mut. Fire Ins. Co. v. Arthur*, 7 Gray, Mass. 267. 1856.

§ 30. The act of incorporation of the Genessee Mutual Insurance Company required the directors to settle and determine "the sums to be paid by the several members thereof, as their respective proportions of any loss, and to publish the same in such manner as they shall see

fit, or as by their by-laws shall have been prescribed." *Held*, that the assessment was not complete and consummated till it was ascertained, fixed and determined by carrying out on the extension book the amount each member was to pay; and that the notice should state the amount demanded of each member; and that a notice issued before the assessment was consummated, and which only stated the rate per cent., was both premature and defective. *Bangs v. McIntosh*, 23 Barb. N. Y. 591. 1857.

§ 31. In an action upon two premium notes, the complaint contained an averment that the company did at various times make assessments on the notes, and required such payments; *Held*, that this was sufficient to show a cause of action in this respect. If the defendants required more particular information, they should have applied to the court, to have the pleadings amended. Where the act of incorporation vested in the directors of the company the right of deciding what amount or portion of the note shall be paid, and provided for the payment at such times, as the directors shall deem necessary, for the honorable and prompt payment of the losses and expenses of the company; *Held*, that it was not necessary to aver in the complaint that such losses had been sustained. *Held*, also, that a resolution levying a — per cent. assessment was a nullity.

Where a witness proved, from his own knowledge, that the books produced were the books of the company, and contained the entries of the proceedings of the board, made by the secretary in his presence; *Held*, that the evidence of the assessment on the notes by the directors was sufficient, and that it was not necessary that the secretary should be called for this purpose. *St. Lawrence Mut. Ins. Co. v. Paige*, 1 Hilton, N. Y. 430. 1857.

§ 32. A premium note, given to a mutual insurance company, was payable, by its terms, in such portion and at such time or times as the directors of the company

should direct. The general insurance law of 1853 in New York, to which the plaintiff was subject, provided that the directors should, after receiving notice of any loss or damage by fire sustained by any member, and ascertaining the same, settle and determine the sums to be paid by the several members, &c., &c., and the sum to be paid by each member should always be in proportion to the original amount of his note, &c. In an action upon such note for the recovery of assessments; *Held*, that the liability of the maker was not an absolute liability to pay the whole amount of his premium note, but was conditional, depending upon the contingency of the happening of losses to which he was liable to contribute, and it devolved upon the plaintiff, seeking to enforce the collection of the note, in whole or in part, to show by proper averments and competent evidence, that the contingency had occurred upon which the defendant's liability became absolute. *Thomas v. Whallon*, 31 Barb. N. Y. 172. 1857.

§ 33. When directors vote an assessment, this is a sufficient requirement of payment on premium note. Notice of assessment need not specify amount due on each note. *Atlantic Marine & Fire Ins. Co. v. Sanders*, 36 N. H. 252. 1858.

§ 34. Where it was necessary for a receiver to make application to the court for their approval of an assessment and no notice was given to the defendant, maker of note; *Held*, that the proceedings of the receiver in making assessments were of no greater force than the same act would have possessed, if done by the board of directors, and that the determination of the court in approving the assessment was not to be regarded as a judicial decision, concluding defendant as to particulars of the assessment. Where neither the notice nor the assessment specified the name of the party bound to contribute, nor the amounts of the notes, but only a notice of the rate per cent. to be paid on certain notes in different classes; *Held*, that this was no objection to recovery, as each party interested possessed

the means of reducing it to a certainty, and was able to calculate, with the rate per cent. given and the knowledge of the amount of his note or notes, the sum he would have to pay. But, where two rates of assessments were imposed, a smaller rate on "large notes," and a larger rate on "small notes," and neither the assessment or notice afforded any criterion for determining what those terms meant, nor was there anything in the case to show what the distinction between these classes was, or to create an inference that the defendant could determine to which class his note was deemed to belong; *Held*, that the notice failed to inform the defendant of what he was required to pay, and that, therefore, he was not in default for not paying. *Bangs v. Duckingfield*, 18 N. Y. 592. 1858.

§ 35. The forfeiture of a policy of insurance in a mutual company, in consequence of the non-payment of an assessment, does not relieve the member, whose property was insured under such policy, from liability for the payment of such assessment on his premium note, when the assessment had been made whilst the policy was in force. *Iowa State Ins. Co. v. Prosser*, 11 Iowa, 115. 1860.

§ 36. Where a meeting of members of a mutual company, called for the purpose of altering the by-laws, and "for the transaction of such business as may come before them," proceeds to elect additional directors; the meeting exceeds its authority, and assessments levied by such directors are void. *People's Mut. Ins. Co. v. Westcott*, 14 Gray, Mass. 440. 1860.

§ 37. All the notes of a mutual insurance company constitute its capital stock; and although the notes of one department must be first assessed to pay the losses of that department, yet, if they are found not sufficient, and anything remains in the other department beyond paying the claims upon them, resort must be had to such remaining assets until the whole are exhausted. If the necessity ex-

ists resort must be had to the entire fund of the company. *White v. Ross*, 15 Abb. Pr. 66. 1860.

§ 38. Although by the Revised Statutes of Maine, of 1841, a demand is required before a mutual insurance company can maintain an action for an assessment, yet, if the charter subsequently enacted, provides that such action may be brought after notice in a paper, the provisions of the charter control the statute. *York County Mut. Fire Ins. Co. v. Knight*, 48 Me. 75. 1861.

§ 39. Where one article of the by-laws of a mutual fire insurance company provided, "If any assessment required by the directors, is not paid within thirty days after notice, the delinquent's policy shall cease and determine," &c., and another by-law provided, amongst other things, "Any policy of insurance payable to the mortgagee in case of loss, shall continue so payable notwithstanding any alienation of the property of the mortgagor, made subsequently to such insurance. And such mortgagee shall pay any and all assessments on the property, provided the original assured shall not pay the same on demand;" *Held*, that the forfeiture provided by the former section did not apply to the case of a mortgagee to whom, by the policy, the loss was made payable; and that he might, in case of loss, recover thereon, although the policy had ceased, by neglect to pay an assessment within the thirty days, as to the mortgagor, whose interest was insured. *Francis v. Butler Mut. Fire Ins. Co.* 7 R. I. 159. 1862.

§ 40. An assessment made by an insurance company upon its premium notes, which includes the amount of a previous assessment for losses that have been paid, is invalid, and cannot be collected. *Cooper v. Shaver*, 41 Barb. N. Y. 151. 1862.

§ 41. If under the by-laws of a mutual insurance company, each person insured is obliged to deposit his

written agreement to be liable for an amount equal to the premium, in addition thereto, to be assessed and collected by the directors in such sums and at such times as they shall deem expedient, the same to be denominated the absolute funds of the company, and it is provided in addition that each member of the company shall be held to pay, in case losses should happen to consume the absolute fund, a certain further sum, assessments upon the notes held as absolute funds must be so made as to require payment of an equal proportion of each note held by the company at the time the assessment is made; and these absolute funds are to be exhausted before a further assessment can be made under the statute. *Appleton Mut. Fire Ins. Co. v. Jesser*, 5 Allen, Mass. 446. 1862.

§ 42. It is no defence to an action by a mutual insurance company to collect assessments, to show that it met and chose officers before its charter went into effect, if subsequently to that time persons were found with the consent and under the authority of the designated corporators, and without objection on the part of the Commonwealth, actually exercising the corporate powers, and claiming and using the franchise. *Appleton Mut. Fire Ins. Co. v. Jesser*, 5 Allen, Mass. 446. 1862.

§ 43. An assessment made upon a premium note, should be made without reference to a former assessment standing in force against the maker of the note, and as to which the assessing power of the insurance company is expended. If it includes such former assessment it will be irregular. *Campbell v. Adams*, 38 Barb. N. Y. 132. 1862.

§ 44. Where the by-laws of a mutual company provide for an assessment for the payment of losses "after the earned premiums shall have been used up," if there be earned premiums that are uncollectable and worthless, they may properly be regarded as "used up." *Maine Mut. Marine Ins. Co. v. Neal*, 50 Me. 301. 1862.

§ 45. Where property insured is conveyed, and the policy is assigned with the assent of the directors of the company, an assessment made against the original assured, and notice to him, will not cause a suspension of the policy, in case of non-payment. The assignee, after the assent of the directors, is the party entitled to notice. *Barnes v. Union Mut. Fire Ins. Co.* 45 N. H. 21. 1863.

§ 46. Where it appeared that several years prior to the appointment of a receiver an insurance company had no funds to pay losses; and the order of reference directed the referee to ascertain the amount of debts, &c., and to make an assessment to pay such debts; *Held*, that it was a fair and legitimate inference that the cash premiums were exhausted, and that a necessity for resorting to the premium notes existed. *Cooper v. Shaver*, 41 Barb. N. Y. 151. 1863.

§ 47. When it appears to a receiver of the assets of a mutual insurance company, from the liabilities of the company, and the times at which the liabilities accrued, and from an examination of all the classes and notes of the company, that there is no note that is not chargeable to its entire amount, for liabilities which justly attached during the existence of the policy accompanying such note, a general assessment may be made upon all the premium notes of the company, without regard to classes and to their full amount. *Sands v. Sanders*, 28 N. Y. 416. 1863.

§ 48. Where assessments have been made on a premium note and paid, after a forfeiture of the policy by an act of the assured, and such forfeiture is successfully set up by the company as a defence to an action on the policy, the amount of such assessments may be recovered back as money paid and received by mistake. *Hazard v. Franklin Mut. Fire Ins. Co.* 7 R. I. 429. 1863.

§ 49. An assessment by a mutual insurance company upon its members of a greater amount than is necessary to enable it to meet existing just claims against it, together with a reasonable allowance for expenses and failures to make collections, is invalid; and an allowance for these purposes of a sum more than the whole amount of the deficiency in its funds is unreasonable, if no special circumstances are shown to justify the excess. *People's Equitable Mut. Fire Ins. Co. v. Babbitt*, 7 Allen, Mass. 235. 1863.

§ 50: Where under the charter and by-laws of a mutual insurance company, a member is liable to assessment on his premium note only for losses and expenses occurring during the term mentioned in his policy, to enable the company to recover it must appear affirmatively that an assessment for losses or expenses occurring within such period has been duly made. *Great Falls Mut. Fire Ins. Co. v. Harvey*, 45 N. H. 292. 1864.

§ 51. Sums voluntarily paid to a mutual insurance company by its members, upon an assessment which is subsequently adjudged to be illegal, with interest thereon, may be treated by the company as just claims against it, and may be included as such in making a new assessment. *Matter of People's Mut. Equitable Fire Ins. Co.* 9 Allen, Mass. 319. 1864.

§ 52. One who has accepted a policy from a mutual insurance company cannot object, in an action to recover an assessment upon his premium note, that the company did not give notice to the secretary of the Commonwealth of their acceptance of their charter. *Traders' Mut. Fire Ins. Co. v. Stone*, 9 Allen, Mass. 483. 1864.

§ 53. A refusal to pay an illegal assessment for thirty days after demand, will not render void a policy of insurance issued by a mutual insurance company, or defeat a

subsequent assessment upon the same, although the by-laws authorize the directors to terminate the same in case of a refusal to pay assessments, and the directors when making the assessments voted that any policy, the holder of which should refuse to pay any assessment for thirty days after a demand on him, should be void. *Matter of People's Mut. Equitable Fire Ins. Co.* 9 Allen, Mass. 319. 1864.

§ 54. If in making an assessment upon the members of a mutual insurance company, after a former assessment has been adjudged illegal, it is found that, two years before, a large debt was due from the company, and that many of the members who paid the sums assessed upon them by the illegal assessment, have become exempt from a new assessment by the limitation of time, so that, if the debt should be assessed upon policies which were in existence at the time when the items of which it was composed accrued, and which still continued liable to assessment, there are not premium notes to a sufficient amount to pay them all, the whole amount of such debt may be taken as a unit, and assessed upon all the policies which were then outstanding, in proportion to the time of their existence, and the amount of their premiums.

In making such assessment for just claims which have accrued within two years, the aggregate of the whole net expenses, and of the sums received in payment of the illegal assessment, during each year, may be divided by twelve, to ascertain the average amount to be raised for each month during that year; to which may be added the amount of losses in each month when losses occurred; and the sum thus ascertained may be taken as the sum to be raised for each month, in proportion to the amounts of the premiums paid therefor, which were applicable to that month. *Matter of People's Mut. Equitable Fire Ins. Co.* 9 Allen, Mass. 319. 1864.

§ 55. One who becomes a member of a mutual insurance company after it has practically adopted the pro-

visions of a general statute authorizing the property insured to be divided into classes, and acted thereon for several years, cannot object, in an action to recover an assessment upon his deposit note, that such provisions were not formally adopted at a meeting regularly called for that purpose. *Citizens' Mut. Fire Ins. Co. v. Sortwell*, 8 Allen, Mass. 217. 1864.

§ 56. If the by-laws of a mutual insurance company do not provide that the deposit notes shall be deemed to be absolute funds of the company, an assessment may be laid before the collection of them has been made or ordered. *Fayette Mut. Fire Ins. Co. v. Fuller*, 8 Allen, Mass. 27. 1864.

§ 57. If no mode of calling meetings of the directors of a mutual insurance company is prescribed in the by-laws, except that the secretary shall notify all such meetings, and if the by-laws do not require that the object of such meetings shall be stated in the notices, an assessment upon deposit notes may be laid at a meeting notified by the secretary, by order of the president, although it is not attended by the president, and although the object of the meeting was not stated in the notices. *Fayette Mut. Fire Ins. Co. v. Fuller*, 8 Allen, Mass. 27. 1864.

§ 58. Payment of an assessment upon the deposit notes of a mutual insurance company cannot be resisted on the ground of the omission to assess certain notes liable to assessment, if it appears that all the notes which were in force during the time in question were assessed except a very small number, which had been adjusted and cancelled by officers of the company before making the assessment, and which were of so small an amount as not materially to increase the assessment upon the remainder. *Fayette Mut. Fire Ins. Co. v. Fuller*, 8 Allen, Mass. 27. 1864.

§ 59. An assessment upon the members of a mutual insurance company of more than double the amount of the deficiency in its funds is unreasonable and void, if no special circumstances are shown requiring so large an assessment. *Traders' Mut. Fire Ins. Co. v. Stone*, 9 Allen, Mass. 483. 1864.

§ 60. If a mutual insurance company have issued policies running for one year, three years and five years, respectively, the premiums for three years being twice the rate charged for one year, and those for five years being three times the rate charged for one year, and, in computing the amount to be assessed for each month's losses, a basis is found by taking the whole of the premium for each one year policy, one-third of that for each three years' policy, and one-fifth of that for each five years' policy; and the Court below have found such method to be just and equitable, the assessment so made will not be held void as unequal. *Citizens' Mut. Fire Ins. Co. v. Sortwell*, 10 Allen, Mass. 110. 1865.

§ 61. If the by-laws of a mutual insurance company do not provide that the deposit notes shall be deemed to be absolute funds of the company, but speak of assessments thereon, such assessments may be laid and collected in the usual manner. *Citizens' Mut. Fire Ins. Co. v. Sortwell*, 10 Allen, Mass. 110. 1865.

§ 62. If a committee of the directors of a mutual insurance company have made a report recommending an assessment upon the deposit notes, and stating the amount and all the details, a vote of the directors to accept and adopt the report is sufficient to authorize the laying of the assessment. *Citizens' Mut. Fire Ins. Co. v. Sortwell*, 10 Allen, Mass. 110. 1865.

§ 63. When claims for losses are allowed by an insurance company or its receiver, the receiver is bound to pay them, provided there are funds for that purpose; and

when there are no funds, it is the duty of the company, or its receiver, to collect enough for that purpose of the note makers. And the latter cannot defeat actions brought against them, upon their notes, for the recovery of such funds, on the ground that the company, or its receiver, might have avoided allowing or paying the losses upon mere technical grounds. *Sands v. Hill*, 42 Barb. N. Y. 651. 1865.

§ 64. The fact that an assessment has already been made upon a premium note which still remains unenforced, will not render a second assessment upon the note, embracing the former one, and designed to accomplish the same purpose, invalid. *Sands v. Sweet*, 44 Barb. N. Y. 108. 1865.

§ 65. A receiver of an insolvent mutual insurance company in assessing its premium notes, acts ministerially and not judicially. His assessment is not final. *Sands v. Sweet*, 44 Barb. N. Y. 108. 1865.

§ 66. In an action by the receiver of an insurance company to recover the amount of an assessment made upon a premium note, the plaintiff need not prove all the facts upon which he, or the company, allowed the losses for which the assessment was made. All that is required is to show that sufficient claims for losses had been presented to the company, or to the receiver, which had been allowed, to make up the sum for which the notes had been assessed. *Sands v. Hill*, 42 Barb. N. Y. 651. 1865.

§ 67. After a decree of the court, under the statute, ratifying an assessment by a mutual insurance company upon its members who at the time of the making thereof were liable to assessment, one whose policy had terminated within two years prior to the making of the assessment cannot object, in an action brought by the company to recover the amount assessed upon him, that the absolute

funds of the company had not been exhausted ; that he was not concluded by the order of the court relative to the assessment ; or that, if liable at all, it was for less than the amount assessed upon him. *Hamilton Mut. Ins. Co. v. Parker*, 11 Allen, Mass. 574. 1866.

§ 68. The legislature has power to provide that a decree of the court, upon a hearing in equity, ratifying an assessment made by a mutual insurance company, shall be conclusive upon all its members, without providing for other than a general notice, and without making any special provision for a trial by jury. *Hamilton Mut. Ins. Co. v. Parker*, 11 Allen, Mass. 574. 1866.

§ 69. Under the statutes of Indiana governing mutual insurance companies, the power to make assessments upon premium notes is limited by the amount of losses sustained and unpaid at the time of making the assessment ; and an assessment made to cover expenses as well as losses is invalid. *Sinnissippi Ins. Co. v. Taft*, 26 Ind. 246. 1866. See *Ib.* 366 ; 342.

See Classification of Risks, § 2. Construction, 8. Dependency of Policy and Premium Notes, 3, 6, 7, 8, 15, 18. Evidence, 47. Foreign Insurance Companies, 31. Illegality of Contract, 9. Lien, 4. Mutual Companies and Members of, 9, 18, 22, 23. Premium Notes, 4, 23, 26, 31, 41. Return Premium, 5. Revival and Suspension of Policy, 4. Stock Notes and Subscriptions, 2, 10. Successive Losses, 2.

ASSIGNMENT.

§ 1. Policies against loss by fire are not in their nature assignable, nor can the interest in them be transferred from one person to another, without consent of the office. But in case of death, the policy and interest therein, shall continue to the representative. In the present case the policy was assigned after the loss, but dated before, and the premises had been sold before loss, and assignee brought bill for relief, which was dismissed. *Lynch v. Dalzell*, 4 Brown, Parl. Cases, 431. 1729.

§ 2. Where policy had this endorsement on back: "If this policy should be assigned, the assignment must be entered within twenty-one days after the making thereof," and assured assigned the policy to plaintiff one month after the fire; *Held*, that such assignment was not within the meaning of the clause, which had reference only to an assignment before the loss happened. *Sadler's Co. v. Badcock*, 2 Atkyns, 554. 1743.

§ 3. A policy in this company is virtually assigned, by a subsequent mortgage of the buildings insured, to the mortgagee. *Farmers' Bank v. Mutual Assurance Co.*, 4 Leigh, Va. 69. 1832.

§ 4. A party, to whom a bankrupt had assigned a policy, sent an agent to the insurance office to pay the premium, who, in the course of conversation with a clerk of the office, told him of the assignment of the policy. *Held*, not sufficient notice to the insurance office of the assignment. *Ex parte Carbis in re Croggon*, 4 Dea. & Ch. 354. 1854.

§ 5. M. entered into an agreement to convey the premises insured, which conveyance was executed after the

fire, and also at the same time agreed, by parol, to assign the policy, which was never done. The policy required notice of the assignment of the policy, to be given to the company; *Held*, that M. was entitled to recover for the whole loss. *Wheeling Ins. Co. v. Morrison*, 11 Leigh, Va. 354. 1840.

§ 6. Where policy of a mutual company provided that "the interest of the insured in this policy, is not assignable without the consent of the said company in writing, and, in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent, this policy shall thenceforth be void and of no effect," and plaintiff assigned the policy without consent of the company; *Held*, 1st, that the clause had exclusive reference to the policy and not to a sale or transfer of the property insured; and, 2d, that an assignment of the policy without consent of the company in writing therefore avoided it. The clause did not nullify the assignment merely, but the policy also. *Smith v. Saratoga County Mut. Fire Ins. Co.* 1 Hill, N. Y. 497. 1841. Affirmed, 3 Hill, N. Y. 508. 1842.

§ 7. A policy contained the following provisions: "The interest of the assured in this policy shall not be assignable without consent of the company in writing; and in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent, the policy shall be void." *Held*, that the interest of the assured last spoken of referred to the interest in the property insured, and not in the mere contract of insurance. *Carpenter v. Washington Ins. Co.* 16 Peters, U. S. 495. 1842.

§ 8. Where a condition of a printed policy authorized "a mortgagee to receive the assignment of a policy, on his signing the note for premium and obtaining the consent of the company," and another condition "prohibited any assignment of the policy without the consent of

the company in writing;" *Held*, that the company, by issuing the policy on the sole note of the assured, and knowing that the assignee was the mortgagee, and referring to application as forming a part of the policy, and in which assured had written that "he wished an assignment to the mortgagee," did not thereby consent, in writing, to the assignment of the policy; and the only inference that could be drawn from such facts, was, that upon mortgagee doing what was required of him, the company would consent. *Smith v. Saratoga County Mut. Ins. Co.* 3 Hill, N. Y. 508. 1842.

§ 9. A general assignment by the insured of all personal property, to pay creditors, does not render a policy void, under the condition, "That, in case of the assignment of policy, &c., without the insurer's consent, the policy shall be void," that clause having exclusive reference to the policy and not to the property insured. *People v. Beigler, Hill & Denio*, N. Y. 133. 1843.

§ 10. Where the by-laws required the consent of the president and directors to an assignment of policies, and the president alone had been in the habit of assenting to assignments, without any objection on the part of the directors, it shows at least a tacit or implied consent of the directors to the same, and a ratification of the president's act, if not a previous authority to do it; and it will be too late upon occurrence of a loss, afterwards, to say that the assignment was not made with the assent of the president and directors. *Philips v. Merrimack Mut. Fire Ins. Co.* 10 Cush. Mass. 350. 1852.

§ 11. Where by-law provided that "no assignment of a policy, in consequence of alienation by sale or otherwise, shall be received or considered valid, unless a premium note of assignee of even date with said assignment shall be first left with the secretary or an agent, and the same approved by the board of directors," proof in such

case, that at time of company's assent to "an order to pay on policy to F. & H." made by the president, a new deposit note of payee had been delivered to an agent to receive and forward applications, make transfers of and deliver policies, but such agent had not forwarded note to company or notified the proper officers of his having it, will not be sufficient to show such a compliance with the above stipulations as to render it a valid assignment. If in such case the plaintiffs would show that the assured had at the time sold their property to the assignee, and that the assignee had duly given a new deposit note in order to draw the conclusion that the officers of the company knew and understood that this was an assignment of the contract, and assented to it, with that understanding, the burden of proof is upon them to show that these officers had that knowledge. *Fogg v. Middlesex Mut. Ins. Co.* 10 Cush. Mass. 337. 1852.

§ 12. The plaintiff insured his property with the defendants; upon its destruction by fire a dispute arose as to the loss, and the matter was referred to arbitration. After the fire, but before the award, the plaintiff assigned the bond of submission, the policy of insurance, and the money due thereon, to one H. *Held*, that the assent of the defendants to the assignment was not necessary; and that, the assignment of the submission bond did not, under these circumstances, by vesting the interest in the assignee, affect the legality of the award made under it. *Hughes v. Mutual Fire Ins. Co. of New Castle, 9 Upper Canada, Q. B.* 387. 1851.

§ 13. Where the original insured had sold the property to the plaintiffs, and endorsed on the policy: "For value received pay the within, in case of loss, to F. & H," which endorsement was assented to by the president of company; *Held*, that *prima facie*, this was not an assignment of the contract, but only of a right to the money in case of loss, and that the plaintiffs, to recover, must prove themselves assignees of the contract, be-

cause they prove an alienation of the property and a sale to themselves, long before the fire, so that all insurable interest in the original assured had ceased, and no loss was sustained by them, by the fire, payable to anybody. *Fogg v. Middlesex Mut. Ins. Co.* 10 Cush. Mass. 337. 1852.

§ 14. Where the charter of a mutual company required the consent and approval of the directors, to assignments of policies, and the secretary consented to the assignment of a policy of insurance, and endorsed such consent upon the policy, and made a memorandum of the same on the books of the company; *Held*, that a formal vote of the board of directors was not necessary, and the assent of the secretary was sufficient. *Durar v. Hudson County Mut. Ins. Co.* 4 Zab. N. J. 171. 1853.

§ 15. An assignment of "all the loss or damages which accrued under the policy prior to" a specified day, passes the whole interest in the policy to the assignee, when it is shown that the loss had accrued, and the policy expired before that day. *Perry v. Merchants' Ins. Co.* 25 Ala. 355. 1854.

§ 16. The assignee's right to sue is not affected by a stipulation in the policy for its renewal, if it had expired without renewal, before the assignment, and the right of renewal was gone with the partial destruction of the property. *Perry v. Merchants' Ins. Co.* 25 Ala. 355. 1854.

§ 17. When a policy of insurance is assigned, after a loss has occurred, the assignee may maintain action on it in his own name, either under the act of 1828 (Clay's Digest, 383), or under the Code (2129), although it contains the usual stipulation against assignment. *Perry v. Merchants' Ins. Co.* 25 Ala. 355. 1854.

§ 18. Where policy provided that in case of an assignment of the policy either in whole or in part, prior or subsequent to the loss, without consent of the company, their liability should thenceforth cease; *Held*, that assured might assign the policy, after a loss, without such consent, notwithstanding the prohibition. *Goit v. National Protection Ins. Co.* 25 Barb. N. Y. 189. 1855.

§ 19. Where policy prohibited an "assignment of the policy, transfer or termination of interest, or of any claim under the policy, either before or after a loss," under penalty of forfeiture; *Held*, that a transfer of his interest in the policy by one of the parties assured, by means of a general assignment, without the consent of the insurers, which was made after loss, avoided the policy. *Dey v. Poughkeepsie Mut. Ins. Co.* 23 Barb. N. Y. 623. 1857.

§ 20. An averment being made in the complaint that the policy was "duly assigned;" *Held*, that these words indicate that it was by a sealed instrument; and a consideration is inferred. *Fowler v. New York Indemnity Ins. Co.* 23 Barb. N. Y. 143. 1857.

§ 21. A policy, "made payable in case of loss to" a third person, is as effectual for the protection of payee's interest, as if the policy had been assigned to payee with the company's consent, "as collateral security." There is no difference between them. *Grosvenor v. Atlantic Fire Ins. Co.* 5 Duer, N. Y. 517. 1856. Affirmed on this point 17 N. Y. 391. 1858.

§ 22. The assignment of a policy of insurance after a loss, does not violate the condition, "prohibiting an assignment of the interest of the assured in the policy," such clause referring only to an assignment of the policy during the pendency of the risks and accompanying the transfer of an interest in the property insured, and not to an assignment of the debt, arising from a loss. *Mellen v.*

Hamilton Fire Ins. Co. 5 Duer, N. Y. 101. 1855. Affirmed, 17 N. Y. 609. 1858. *Brichta v. New York Lafayette Ins. Co.* 2 Hall, N. Y. 372. 1829.

§ 23. The clause in a policy, which prohibits an assignment of the policy, without the consent of the insurance company in writing, does not apply to a deposit of the policy by way of pledge, with a creditor of assured. *Ellis v. Kreutginger*, 27 Mo. 311. 1858.

§ 24. Policy provided that "Policies of insurance subscribed by this company shall not be assignable before or after a loss, without the consent of the company, expressed by an endorsement thereon. In case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of such company in virtue of such policy shall thenceforth cease," &c. After a loss had occurred, the assured assigned all his claim, under the policy, to the plaintiff; *Held*, that the words "the liability of the company in virtue of such policy shall thenceforth cease," must be construed to mean its liability as an insurer for losses to accrue thereafter, and not for losses which have already accrued; and consequently that plaintiff might recover. *Courtney v. New York City Ins. Co.* 28 Barb. N. Y. 116. 1858.

§ 25. Policy was assigned as follows: "For value received, I hereby assign, transfer, and set over unto W. and his assigns, all my right, title and interest in this policy of assurance, and all benefits and advantages to be derived therefrom, as collateral security on a bond," &c. The charter of the company provided that "if any person, insured in this corporation, shall convey or assign the property insured, it shall be lawful for such person to assign to the purchaser the policy of insurance; but the corporation shall not be bound by such policy after such assignment, until the said assignment shall have been recorded in the books of the corporation, and certified on said policy by the secretary." Assignee brought action

under the above policy, simply averring in his declaration "that the policy was assigned to him as collateral security for a bond of \$422." *Held*, that the action could not be maintained, as the declaration did not further aver a conveyance or assignment of the property to the plaintiff, a record of the assignment, and its certificate on the policy, or other cause of liability. *Bayles v. Insurance Co.* 3 Dutch. N. J. 163. 1858.

§ 26. A. held a bond for a deed of a certain piece of land and borrowed money of B. to build thereon, and, to secure B., afterwards took out a policy on the buildings, "Loss if any payable to B." The insurance company being cognisant, not only of the nature of the interest to be insured, but also of the claim due to B. Some months afterwards, A. assigned all his equitable claim and title, under the bond, to B., and, subsequent to such assignment of the property, B. paid up the balance due on the bond, and received a deed to the premises from the obligor of the bond. The policy provided: "The person for whose interest the insurance is made must be declared and named therein, nor can any policy or interest therein be assigned, but by the consent of the company, expressed by endorsement made thereon." In a suit in equity on such policy; *Held*, that the policy must be regarded as having been, at its inception, assigned to B. with the consent of the company, and that the circumstance of the property insured having been subsequently transferred to B., the assignee, did not come within the above prohibition against assignment of the policy or an interest therein, and did not therefore avoid it. *National Fire Ins. Co. v. Crane*, 16 Md. 260. 1860.

§ 27. Where the policy by its terms prohibited an assignment thereof without consent of the company; *Held*, that such condition referred only to an assignment of the policy before a loss, and that an assignment of policy after a loss was equivalent to an assignment of the debt, created and become due by the loss, and was not therefore within the prohibition. *Carter v. Humboldt Fire Ins. Co.* 12 Iowa, 284. 1861.

§ 28. A policy on a mechanic's lien interest was assigned as collateral security with the consent of the company. *Held*, that the assignment of the policy was valid, though unaccompanied by any transfer of the indebtedness secured by the mechanic's lien. *Stout v. City Fire Ins. Co. of New Haven*, 12 Iowa, 371. 1861.

§ 29. The policy "agreed to make good unto the assured, his executors, administrators, and assigns, all such immediate loss," &c. It also contained this provision: "Policies of insurance subscribed by this company shall not be assignable without the consent of the company, expressed by endorsement made thereon. *Held*, that the policy was assignable after loss without such consent. *Walters v. Washington Ins. Co.* 1 Iowa, 404. 1855.

§ 30. After a right of action for a loss has accrued, no condition in the policy can prevent a subsequent assignment of the claim. The legal effect of the claim cannot be limited by such a condition; the right to receive the insurance becomes a *chose in action*, and as such is assignable, and such condition, if applicable, is void, because contrary to law. *West Branch Ins. Co. v. Helfenstein*, 40 Penn. St. 289. 1861.

§ 31. The only interest which passes by an assignment of a policy after a loss has occurred, and after the insurers have been served with notice thereof and with the preliminary proofs, is the claim or debt which the insured holds against the insurers for the amount of the loss; and such an assignment is not a breach of a condition forbidding a transfer of the *policy*, without the consent of the company. *Carroll v. Charter Oak Ins. Co.* 38 Barb. N. Y. 402. 1862.

§ 32. A provision, in a policy, prohibiting a transfer of the interest of the assured after loss, is illegal and void. *Carroll v. Charter Oak Ins. Co.* 38 Barb. N. Y. 402. 1862.

§ 33. An assignment of a policy by the insured to a mortgagee is not necessary where the company writes across its face: "Loss, if any, payable to C., mortgagee." *Keeler v. Niagara Fire Ins. Co.* 16 Wis. 523. 1863.

§ 34. A condition, annexed to a policy, which provides that policies shall not be assigned "either before or after a loss," by its terms relates to transfers of policies only, and contains no words which require or justify a construction applying it to and prohibiting transfers of claims for loss. *Carroll v. Charter Oak Ins. Co.* 40 Barb. N. Y. 292. 1863.

§ 35. An assignment of the assured's interest in the policy, executed after a loss occurred, carries, not the policy, but the claim or debt which the assignor has against the insurers, for the loss; and is not a breach of a condition in the policy which provides that the interest of the assured in the policy is not assignable unless by consent. *Carroll v. Charter Oak Ins. Co.* 40 Barb. N. Y. 292. 1863.

§ 36. Where a purchaser agrees to insure for the benefit of his vendor, and to assign the policy for his security, and he subsequently procures the building to be insured, but does not assign the policy to the vendor, the agreement operates as an equitable assignment of the money payable upon the policy, in case of loss, but not as an assignment of the policy. Such a case does not come within the terms of a clause in the policy, declaring that the interest of the insured in the policy is not assignable, unless with the consent in writing of the insurers, and that the policy shall become void if such interest is transferred or terminated without such consent. *Cromwell v. Brooklyn Fire Ins. Co.* 39 Barb. N. Y. 227. 1863.

§ 37. Where a policy, which by its terms, if assigned without the consent of the insurers, was to be void, and

the assured executed an assignment, to be delivered after such consent had been obtained, but which was not delivered, because consent was withheld; *Held*, that such assignment was inoperative to affect the rights of the parties. *Smith v. Monmouth Mut. Fire Ins. Co.* 50 Me. 96. 1863.

§ 38. A contract of affirmance of a transfer of a policy founded on misrepresentation is voidable, but not void, and if an insurance company, after knowledge of the facts, recognize the existence of the contract, by acting upon it, demanding and receiving payments of assessments under it, they thereby waive all right to avoid it. *Cumberland Valley Mut. Protection Co. v. Mitchell*, 48 Penn. St. 374. 1864.

§ 39. It is not necessary that the interest of persons in the property insured be stated, when application is made for the ratification of the transfer of a policy of insurance. *Cumberland Valley Mut. Protection Co. v. Mitchell*, 48 Penn. St. 374. 1864.

§ 40. The rule which requires an applicant for insurance to set forth the nature of his interest in the property to be insured, does not extend to assignments of policies while in force. *Lycoming Ins. Co. v. Mitchell*, 48 Penn. St. 368. 1864.

§ 41. H. obtained an insurance from the defendants upon property owned by him, the policy stating that the loss, if any, should be "payable to F. as collateral." H. was indebted to F. at the time; *Held*, that the agreement that F. should receive the money, in case of a loss, was only collateral to, and dependent upon, the original undertaking, that after a loss had occurred, and not before, the money should be paid over to F., and not an assignment of the policy before any loss. That the facts presented did not show an assignment before loss, to a party who had no interest in the property, within the principle of the

cases, but a case where the relation of insurer and insured existed between the defendant and H. the owner of the property, until a loss had taken place, when F. as appointee of the insured, stepped in and claimed under the agreement that the insurer should pay the money to him. *Frink v. Hampden Ins. Co.* 45 Barb. N. Y. 384. 1865.

§ 42. In general, a contract of insurance is a personal contract with the assured, and the policy does not pass, so as to continue the liability of the company, to an assignee or purchaser of the property insured, unless by the consent of the underwriters, or the properly authorized officer or board of the association. *Simeral v. Dubuque Mut. Fire Ins. Co.* 18 Iowa, 319. 1865.

§ 43. An assignment of a policy of insurance upon a stock of goods effected in the name of the assignor, made as collateral security for a debt due from the assignor to the assignee, with an agreement that in case of loss by fire the assignee shall collect the money and apply it on the debt, attaches in equity, as a lien upon the amount due on the policy to the extent of the debt, as soon as the loss occurs, as against the assignor and all persons asserting a claim thereto under him. It is not necessary to the validity of such contract, that the assignees have any interest in the property insured, nor that the insurer consent to the assignment. *Bibend v. Liverpool & London Fire and Life Ins. Co.* 30 Cal. 78. 1866.

See Agent, § 41. Alienation, 12, 28, 30, 34, 42, 45. Arbitration, 8. Assessments, 3. By-laws and Conditions, 8. Construction, 8. Garnishment or Trustee Process, 7. Interest in Policy, 32. Parol Evidence, 35. Premium Notes, 15. Responsibility of Assignee for acts of Assignor, 1. Revival and Suspension of Policy, 3, 7. Who May Sue, 9, 22. Insurable Interest, 38.

BONDS OF AGENTS.

§ 1. An agent and his surety in a bond for faithful performance of duties, &c., acknowledged themselves "to be held and firmly bound unto the directors," &c., of the company in the sum of \$1,000, "to be paid to the said directors, their successors or assigns." An action was brought on the bond in the corporate name of the company; *Held*, that the declaration ought to have contained an averment, that the bond was made to the plaintiffs by the name and description of the "directors of the Onondaga County Mutual Insurance Company," but that the declaration was sufficient after verdict or judgment by default, without this averment, as the board of directors being the known legal agents of the corporation, were to be regarded as its representatives, in all their official acts. *Bayley v. Onondaga County Mut. Ins. Co.*, 6 Hill, N. Y. 476. 1844.

§ 2. The statute of Pennsylvania, requiring agents of foreign insurance companies to publish certain statements, is directory, and does not invalidate business done by such agents, nor invalidate a bond given by any agent to his company for faithful discharge of duty.

It was the agent's duty to publish such statement, and his default cannot be set up, as a defense against a suit on the bond, by either him or his sureties. *Washington Ins. Co. v. Colton*, 26 Conn. 42. 1857.

§ 3. A bond was executed by an insurance broker, as the principal obligor, and two sureties, with a condition that if they should pay the company all premiums to become due, &c., the bond should be void. The broker became bankrupt, and at the time was indebted to the company in a considerable sum for premiums, and of which they received a dividend of six shillings in the

pound. The premiums were due three years before the bankruptcy, and the company did not call on the sureties until after the bankruptcy; *Held*, 1st, that the sureties were not discharged by the laches of the company; 2d, that the dividend received by them was to be deducted as against the sureties, from the penalty contained in the bond. *London Assurance Co. v. Buckle*, 4 Moore's Rep. 153. 1820.

§ 4. D. gave a bond to the company of which he was secretary for the faithful performance of his duties "during his continuance in office, by virtue of his appointment," and C. signed the bond as surety; D. was continued in office from year to year by re-election, and when he went out of office was in arrears to the company for money received by him and not paid over, to the amount of \$990, all of which accrued, however, after his first year in office; *Held*, that the bond was operative only during the first year, and did not cover defalcations which occurred during the subsequent years D. held the office. *Kingston Mut. Ins. Co. v. Clark*, 33 Barb. N. Y. 196. 1860.

BOOKS OF ACCOUNT AND VOUCHERS.

§ 1. One condition of the policy required assured to verify their loss by "their books of account and other proper vouchers." This additional proof had been demanded by the company after the fire, but all of the assured's "books of account and vouchers" having been destroyed by the fire, the assured was unable to comply with their demand. The company then required assured to duplicate their invoices, and get the pass books of their journeymen, in which were entered the boots and shoes and other articles manufactured by the assured, and there was evidence tending to show that assured promised to get

them, but it was never done. The jury were instructed that if they were satisfied that all the assured's "books of account and vouchers" were burnt up, they were not bound to procure such documents as were called for by the company; that such invoices and pass-books belonged to the merchants and journeymen with whom assured had dealings, and were not in assured's possession or control, and were not the "books and other proper vouchers" required to be produced by the conditions of the policy. In a motion for a new trial, this instruction to the jury was held to be correct. *Mechanics' Fire Ins. Co. v. Nicols*, 1 Harrison, N. J. 410. 1838.

§ 2. The fact of the conditions of a policy of insurance requiring that any claim for a loss shall be sustained, if required, by the books of account and other vouchers of the assured, creates no implied warranty on the part of the latter to keep books of account, and to be ready to exhibit them when called on. *Wightman v. Western Marine & Fire Ins. Co.*, 8 Rob. La. 442. 1844.

§ 3. After a loss, the assured gave to the secretary of the company a list of the names from whom he had purchased his goods, and subsequently the secretary requested assured to sign a paper calling upon the purchasers to duplicate the bills he had bought of them, but assured refused to sign it; *Held*, that his refusal to do so did not prevent recovery. *Franklin Ins. Co. v. Culver*, 6 Ind. 137. 1855.

§ 4. Insurance was £1,000 upon clothes and ready-made clothing. The 10th condition of policy, among other matters of preliminary proofs, required the production of "books of account and other proper vouchers," and that until this was done, the loss should not be payable. The company had required certain invoices, which the plaintiffs refused to produce, though it was in their power to do so; but the jury, being satisfied on other evidence that the loss had been actually sustained, found

in favor of the plaintiff. *Held*, that not having complied with the condition in the policy, the plaintiffs could not recover, and a new trial was granted. *Cinqu Mars v. Equitable Ins. Co.* 15 Upper Canada, Q. B. 143. 1856. See also same case and like decision in the suit on another policy. 15 Upper Canada, Q. B. 246. 1856.

§ 5. Where by the terms of the policy it was agreed that the assured should produce, if required by the assurers, his books of account and other vouchers in support of his claim, and permit extracts and copies to be made; and he was required by the insurers to produce his bills of purchases; and he told them it was impossible to do so; that he had only found a few bills; and afterwards he found others, but did not produce any to the insurers; and the insurers requested him to furnish further statements, and the bills of purchases, or duplicates of them, but under the advice of the counsel he declined; *Held*, that not having complied with the agreement in the policy, he could not recover. *Jube v. Brooklyn Fire Ins. Co.* 28 Barb. N. Y. 412. 1858.

§ 6. The assured's books of account are not evidence of themselves, as they have been and are considered in some courts. They should be regarded as entitled to no further weight than the proof of the witnesses who were examined in relation to their accuracy would justify. *New Mark v. London & Liverpool Life & Fire Ins. Co.* 30 Mo. 160. 1860.

BURDEN OF PROOF.

§ 1. The burden of proof of misrepresentations is on the defendants. *Catlin v. Springfield Fire Ins. Co.* 1 Sumn. C. C. U. S. 434. 1833.

§ 2. It is sufficient to show that the loss was occasioned by a peril within the policy, without negating exceptions of loss from "design, invasion, insurrection, &c. &c." which are properly matters of defense. *Catlin v. Springfield Ins. Co.* 1 Sumn. 434. 1833. *Lounsbury v. Protection Ins. Co.* 8 Conn. 459. 1831.

§ 3. If insurers rely upon the falsity of a representation that a cask of water was kept in the third story of a woolen manufactory, as an avoidance of the policy, it is a matter of defense; and the burden of proof is on the defendants to prove that a cask of water was not placed in the third story. *Jones' Manufacturing Co. v. Manufacturers' Mut. Fire Ins. Co.* 8 Cush. Mass. 82. 1851.

§ 4. The burden of proving a compliance with a promissory warranty is upon the assured, and the burden of proving a breach thereof is not upon the insurers. *Wilson v. Hampden Ins. Co.* 4 R. I. 159. 1856.

§ 5. In an action on a policy of insurance, it is not necessary for the plaintiff to prove his title, until it has been assailed by evidence; nor need he allege it, in his complaint. *Fowler v. New York Indemnity Ins. Co.* 23 Barb. N. Y. 143. 1857.

§ 6. Where in an action on a policy, the defense admitted the existence of a title originally sufficient to sustain the contract, but alleged a subsequent alienation, which, by the condition of the policy, avoided it; *Held*, that the defendants, having assumed the affirmative of the issue of alienation of the property insured, were bound to prove it. *Orrell v. Hampden Fire Ins. Co.* 13 Gray, Mass. 431. 1859.

§ 7. In an action on a policy of insurance, in which the defence relied upon is a subsequent insurance contrary to the terms of the first policy, the burden of proving

that the two policies covered the same property is upon the defendants. *Clark v. Hamilton Mut. Ins. Co.* 9 Gray, Mass. 148. 1857.

§ 8. Where an application represented that one stove was used in the building insured, and another stove was subsequently put in and used without notice; and the by-laws of the defendant company provided that "if the risk shall be increased by the insured or others by any change of the circumstances disclosed by the application," &c. "the policy shall be void;" *Held*, incumbent on the defendant company to show that the addition of the second stove increased the risk, if they would avoid the insurance. *Newhall v. Union Mut. Fire Ins. Co.* 52 Me. 180. 1863.

§ 9. In an action upon a policy of insurance on a theatre, which contains, in connection with the description of the property insured, this clause, "This policy not to cover any loss or damage by fire which may originate in the theatre proper," the burden of proof is on the plaintiff to show a loss not originating in the theatre proper. *Sohier v. Norwich Fire Ins. Co.* 11 Allen, Mass. 336. 1865.

§ 10. The charter of an insurance company, which was printed on and made part of the policy, provided that the insurance should be void if any alteration were afterwards made in the building insured, or if any other building should be erected or placed contiguous thereto, whereby it might be exposed to greater risk or hazard than it was when insured, unless done with the consent of the directors. In a suit upon the policy; *Held*, that the burden of proof was upon the company to show a violation of the terms of the policy; and that it was properly left to the jury to determine whether any contiguous buildings had been erected so as to increase the risk that had been taken. *Ritter v. Sun Mut. Ins. Co.* 40 Mo. 40. 1867.

See Agent, § 67. Application, 16. Assignment, 11. Certificate, 3. Construction, 4. Contribution, 2. Duration, 4. False Swearing, 7. Increase of Risk, 7, 14, 21. Notice of Loss, 12. Premium Notes, 16.

BURNING BY DESIGN.

§ 1. Where in an action on a policy of fire insurance, the defense was, that assured himself set fire to the premises, and the judge instructed the jury that the proof in support of such defense must be as strong and full as would be required to convict assured, if on trial for arson; *Held*, that such instruction was correct. *Thurtell v. Beaumont*, 1 Bing. 339. 1823. *Thurtell v. Beaumont*, 8 Moore, 612. 1823.

§ 2. Where a defense is, that assured himself set fire to the premises, such fraudulent intent must be shown; but it may be shown by presumptions, as well as by direct evidence, and when once established, no recovery can be had. *Regnier v. Louisiana State Marine & Fire Ins. Co.* 12 La. 336. 1838.

§ 3. To defeat a recovery on a policy of insurance on the ground that the plaintiff set fire to the premises, it is not necessary that the evidence should be such as would convict the plaintiff on a prosecution for arson. *Wightman v. Western Marine & Fire Ins. Co.* 8 Rob. La. 442. 1844.

§ 4. In an action on a policy of insurance effected on account of the plaintiff by an agent, testimony to prove that the latter, who had a policy for his own benefit on goods in the same building, designedly set fire to the building, is inadmissible where it is neither alleged nor proved that they were in any way privy to the act.

The act can no more affect the plaintiffs than if done by a stranger. *Henderson v. Western Marine & Fire Ins. Co.* 10 Rob. La. 164. 1845.

§ 5. Where defense is, that assured himself set fire to the premises, the evidence is not required to be as full and conclusive as would be necessary to support an indictment for arson. *Hoffman v. Western Empire Ins. Co.* 1 La. An. 216. 1846.

§ 6. The evidence to establish a burning by design, must satisfy the jury beyond a reasonable doubt; and to establish the burning by gross negligence, on the part of one to whom the money is payable, there would be stronger reason requiring full proof. *Butman v. Hobbs*, 35 Me. 227. 1853.

§ 7. The company in resisting an action on the policy set up, that the assured himself set fire to the building. It was claimed that the company was bound, as in a criminal case, to prove the act charged beyond a reasonable doubt; but it was held by the court that this rule did not obtain in an action of assumpsit on the policy. *Schmidt v. New York Union Mut. Fire Ins. Co.* 1 Gray, Mass. 529. 1854.

§ 8. Where the defense is, that assured himself set fire to the premises, every legal presumption is in favor of assured's innocence; and he should not be pronounced guilty, unless that guilt is clearly established by evidence, excluding or overcoming every fair and reasonable hypothesis of his innocence. *McConnell v. Delaware Ins. Co.* 18 Ill. 228. 1856.

§ 9. In an action on a policy of fire insurance; *Held*, that proceedings could not be stayed, because a true bill had been found by a grand jury, and was then pending against the assured on a charge of arson, with a view to defraud the defendants. *Maguire v. Liverpool & London Fire & Life Ins. Co.*, 7 Lower Canada, S. C. Quebec, 343. 1857.

§ 10. An action on a policy of insurance is a civil action, and though the defense set up be, that the assured set fire to the building, the rule of evidence is the same as in other civil actions, and the jury may find the issue upon the weight or preponderance of evidence. *Washington Union Ins. Co. v. Wilson*, 7 Wis. 169. 1859.

§ 11. In a trial for arson, committed with intent to defraud an insurance company, it is not necessary for the people to prove that the policy was valid, and that the defendant could maintain an action thereon for loss. *People v. Hughes*, 29 Cal. 257. 1865.

See Evidence, § 2. Negligence, 2.

BY-LAWS AND CONDITIONS.

§ 1. Conditions are to be construed strictly against those for whose benefit they are reserved, when they impose burdens on other parties. *Catlin v. Springfield Fire Ins. Co.*, 1 Sumner, C. C. U. S. 434. 1833.

§ 2. Where policy was made out on a half sheet, and another half sheet attached, headed, "Conditions of Insurance," but no reference in body of policy to such conditions, nor any express terms making such conditions a part of the policy, and among the conditions was one "prohibiting an increase of risk by means within control of assured, under penalty of forfeiture of the policy;" *Held*, that such conditions were *prima facie* a part of the policy, and that the erection of a frame addition, therefore, to the building insured, putting in it a fireplace and stove, being an admitted increase of risk, avoided the policy. *Roberts v. Chenango County Mut. Ins. Co.*, 3 Hill, N. Y. 501. 1842.

§ 3. In a policy of insurance on "paper mill, \$750; on machinery, \$1,000, and on stock, \$750;" this clause followed the description: "Reference being had to application of said Trench for a more particular description and the conditions annexed, as forming a part of this policy; *Held*, that the conditions thus referred to were made a part of the contract, but otherwise with the application, that being referred to for the mere purpose of describing and identifying the property, and not to incorporate its statements into the policy as part of the contract. *Trench v. Chenango County Mut. Ins. Co.* 7 Hill, 122, N. Y. 1845.

§ 4. Application and conditions being referred to in same manner as above; (7 Hill, 122, see § 3;) *Held*, that both application and conditions were made part of the contract and incorporated in it. *Jennings v. Chenango County Mut. Ins. Co.*, 2 Denio, N. Y. 75. 1846.

§ 5. A paper annexed to a policy and delivered with it, purporting to be "conditions of insurance," is *prima facie* a part of the policy, whether referred to in the body of the policy, by express words, or not. *Roberts v. Chenango County Mut. Ins. Co.*, 3 Hill, N. Y. 501. 1842. *Murdoch v. Chenango County Mut. Ins. Co.*, 2 Comst. N. Y. 210. 1849. *Sexton v. Montgomery County Mut. Ins. Co.*, 9 Barb. N. Y. 191. 1848.

§ 6. Where the by-laws annexed to the policy were not referred to in body of policy, nor made a part thereof in express terms; *Held*, that they formed no part of the contract and insured was not bound by them. *Kingsley v. New England Mut. Fire Ins. Co.* 8 Cush. Mass. 393. 1851.

§ 7. A mutual company has no right, without consent of the corporator, to impose any new condition affecting the contract to his injury; as by a by-law passed after making the contract. *New England Mut. Fire Ins. Co. v. Butler*, 34 Me. 451. 1852.

§ 8. At common law a policy is not assignable so as to give the assignee a right of action in his own name, though the policy be by its terms to assured and his assigns. Where charter provides that an alienee may have the policy assigned to him with consent of the directors, such alienee may sue in his own name; but a mortgagee is not an alienee within such provision. A by-law, however, conferring the privileges of an alienee on a mortgagee, is valid, and gives the latter the right to sue in his own name. And when the assignee thus acquires the right to sue, he alone can sue, and no action can be sustained in the name of the assignor. *Rollins v. Columbian Mut. Fire Ins. Co.* 5 Fost. N. H. 200. 1852.

§ 9. A by-law requiring suit to be brought in a particular court, is void. *Nute v. Hamilton Mut. Ins. Co.* 6 Gray, Mass. 174. 1856.

§ 10. A by-law requiring suit to be brought in a particular court within a fixed time, is good as to time, and void as to the rest. *Amesbury v. Bowditch Mut. Fire Ins. Co.* 6 Gray, Mass. 596. 1856.

§ 11. An article of the by-laws of the company, annexed and referred to in the policy, provided that if the risk on any property insured by said company shall be increased by the insured, or "others," by any change of circumstances disclosed in the application, the policy shall be void, unless," &c. An alteration, increasing the risk, was made by "others;" *Held*, that the condition was part of the policy and was a valid condition. Whether the change increased the risk, was a question for the jury. *Shepard v. Union Mut. Fire Ins. Co.* 38 N. H. 232. 1859.

§ 12. An insurer may prescribe any conditions to his undertaking that he pleases, and if he makes it a condition that a constant watch shall be kept on the premises, otherwise the policy shall be void, if the assured fails to keep a watch, the policy ceases, and no question can be made

whether compliance affected the risk in any way; but when such condition is qualified by a limitation as to its materiality to the risk, it opens that question in each particular case. *Parker v. Bridgeport Ins. Co.* 10 Gray, Mass. 302. 1858.

§ 13. An omission to make the formal preliminary proof of loss, under a policy of insurance, in compliance with the requirement of the by-laws, may be waived by the officers of a mutual insurance company, although the by-laws also provide that they "may be altered at any annual meeting, or at any legal meeting of the company called for that purpose." *Thurston v. Citizens' Mut. Fire Ins. Co.* 3 Allen, Mass. 602. 1862.

§ 14. Where a policy of insurance provides that "goods held in trust, or on commission, are to be declared as such, otherwise the policy will not extend to cover such property," and it appears that the insured have obtained their insurance, without making any specific statement of the nature of their interest in the goods destroyed; *Held*, that the insurer had a right to limit the extent of the risk by such condition; and that a knowledge thereof, by the insured, must be presumed from their acceptance of the policy, and that such condition had the effect of limiting the risk to the goods actually belonging to the insured. *Baltimore Fire Ins. Co. v. Loney*, 20 Md. 20. 1862.

§ 15. By one of the conditions of a policy of insurance issued to a mortgagee, the assured was required, in the event of a loss, to assign to the company the mortgage upon the premises insured, together with the debt secured thereby, or so much thereof as would be sufficient to pay the loss, and a refusal to execute such assignment, should operate to discharge the company from all liability under the contract; *Held*, that an assignment of so much of the mortgage debt as would cover the amount of the insurance was a sufficient compliance with such condition. The

assured cannot be required to assign the entire debt, when it exceeds the amount insured. Nor is it an unreasonable condition of such assignment, that the insurers shall collect such debt at their own cost. New England Fire & Marine Ins. Co. 32 Ill. 221. 1863.

§ 16. Where a policy of insurance contains certain provisions, in case of loss under it, as to notice to the company, proof of loss, &c., by the assured, and that any fraud or attempt at fraud, or false swearing on the part of the assured, shall cause a forfeiture of all claim under it; they must be substantially complied with before the claim becomes payable, and unless waived by the insurer, are conditions precedent to the right of the assured to maintain an action. *Gies v. Bechtner*, 12 Minn. 279. 1867.

See Application, § 3. Assessments, 7. Certificate, 18. Other Insurance, 57. Preliminary Proofs, 28. Premium Notes, 19. Venue, 7.

CAMPHENE.

§ 1. Where the conditions annexed "were referred to and to be resorted to, to explain the rights and obligations of the parties to the contract," &c.; and one of the conditions read, "Camphene cannot be used in the building where insurance is effected, unless by special permission in writing, and is then to be charged an extra premium;" and defendants proved that camphene had been used in the building, but that it had been taken out before the fire, and lower court ruled out the evidence; *Held*, that the evidence ought to have been admitted, as the prohibition of its use in the building must be taken and regarded as a part of the contract, and was a warranty that camphene should not be used in the building insured; and further, that the removal of the camphene before the fire would not

restore the validity of the policy, without the consent of both parties, unless the insurer by some act or line of conduct waived the breach or violation of the warranty. *Mead v. Northumberland Ins. Co.* 3 Seld. N. Y. 530. 1852.

§ 2. Where policy contained the usual clause against an "appropriation or use of the premises," or "any part thereof," &c., and the classes hazardous, extra hazardous, and memorandum of special hazardous goods and trades were enumerated, and at bottom of special hazardous was this clause: "Camphene, spirit gas, or burning fluid, when used in stores or warehouses as a light, subjects the goods therein to an extra charge of 10 cents per \$100, and premium for such use must be endorsed on the policy," and it appearing that camphene had been used for lighting in the store insured up to the time of the fire, without permission or payment of extra charge; *Held*, that the use of it was prohibited, and that the policy was void. *Westfal v. Hudson River Fire Ins. Co.* 2 Kern. N. Y. 289. 1855. Reversing 2 Duer, N. Y. 490.

§ 3. Where a condition in a policy provides that "this company will not be liable for any loss, occasioned by camphene or other inflammable liquid;" it means, not that the fire must originate with the camphene, by its own ignition, but as a medium of its communication from outside or other cause, thus occasioning a fire which would not have happened, but for the presence of that article on the premises. *Harper v. City Ins. Co.* 1 Bosw. N. Y. 520. 1857.

§ 4. A clause in policy of insurance on "stock of cap fronts and other goods" provided that "lighting the premises insured, by camphene or spirit gas, without written permission in the policy, shall render it void;" *Held*, to apply to insurance on merchandise, as well as on buildings, and to be binding on insured. *Stettiner v. Granite Ins. Co.* 5 Duer, N. Y. 594. 1858.

See Parol Evidence, § 22. Use and Occupation, 46. Written Portion of Policy, 4, 6.

CANCELLATION.

§ 1. Policy cannot be cancelled by a vote of the company, and notice to the holder, unless the latter consent to the same, (no evidence in the case of any clause giving the right to cancel.) *Alliance Mut. Ins. Co. v. Swift*, 10 Cush. Mass. 433. 1852.

§ 2. Where condition of policy provided for cancelling the policy, if risk should be deemed undesirable, and the insurers instructed their agent to cancel the policy, but instead of so doing he only notified the assured of the company's desire to cancel, and at the same time agreed with insured to let the policy remain until he (assured) could effect another insurance; *Held*, that the policy was not cancelled and the insurers were liable. *Goit v. National Protection Ins. Co.* 25 Barb. N. Y. 189. 1855.

§ 3. By-law provided that, "If the risk be increased by any change of the circumstances disclosed in the application, &c., the policy shall thereupon be void, unless an additional premium and deposit shall be settled with and paid to said company." After effecting insurance, plaintiff put up seven additional stoves in the building, and notified defendants thereof, admitting it to be an "increase of risk." Defendants replied, declining to continue the insurance, and said they would surrender his premium note without charge. Plaintiff wrote again to know if they would not return also the cash premium that had been paid by him, and that if so, he would be satisfied, and get insured elsewhere; and company replied that they would not, but would make no assessment on his note. Afterwards the property was destroyed, before anything was done; *Held*, that this was notice to the plaintiff that the company declined to assume the "increased risk," and elected to terminate their insurance under the above by

law, and that thereupon their policy was void. *Fabyan v. Union Mut. Fire Ins. Co.* 33 N. H. 203. 1856.

§ 4. Where in pursuance of an arrangement made with an agent, a party took out a new policy, and at the same time sent an old policy to another company with instructions to cancel the same as of that date; *Held*, that as between the insured and the former company, on a question of other insurance, the old policy was to be deemed cancelled as of the date stated, though not actually received and cancelled by the company until afterwards. *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328. 1857.

§ 5. Policy issued by agent, with provision for renewal on payment of premium, to be endorsed on policy or otherwise acknowledged by secretary or authorized officer of the company. Renewed several times by agent. At last renewal, company directed agent to return premium, and cancel the policy. Agent notified insured, but did not return premium for a few days for want of funds, and in the meantime fire occurred; *Held*, that as the acts of the agent in making these renewals had been several times ratified, he must be deemed authorized for that purpose, and that the company must pay the loss. *Franklin Fire Ins. Co. v. Massy*, 33 Penn. St. 221. 1859.

§ 6. A receipt in the following form: "The Times & Beacon Assurance Company, Agent's Office, Brantford, 3d February, 1858. Received from Messrs. T. Goodfellow & Co. the sum of fourteen dollars, being the premium for an insurance to the extent of \$2,000, on property described in the order of this date, subject to the approval of the board at Kingston, the said party to be considered insured for twenty-one days from the above date, within which time the determination of the board will be notified. If approved, a policy will be delivered; otherwise the amount received will be refunded, less the premium for the time so insured." *Held*, not an absolute insurance for

twenty-one days certain, but that the company might within that period reject the risk, and give notice, after which their liability would cease. *Goodfellow v. Times & Beacon Assurance Co.* 17 Upper Canada, Q. B. 411. 1859.

§ 7. One of the by-laws of a mutual fire insurance company, annexed to and made a part of its policies, provided, amongst other things, that it should "be optional with the company to terminate the insurance after seven days notice given to the insured, or his representative, of their intention to do so," in which case, they were to refund a ratable portion of the premium. In winding up the affairs of the company, under a company vote to that effect, the directors and their committee ordered, that the class of policies which included the plaintiffs, should be cancelled on the 15th of February, "or as soon after the date named, as shall be found practicable, allowing for due notice to all parties, and reasonable time to procure new insurance." On the evening of the 13th February, but after the closing of the post-office, a notice, directed to the plaintiff, was deposited in the post-office, informing him that all policies of the class of his would be cancelled on the 20th of February, and that from and after that date, no member of the class would be held insured or liable to assessment. The plaintiff received this notice on the 14th February, and on the 22d February, his property covered by the policy was destroyed by fire; *Held*, in a suit by him upon the policy, that he could not recover this loss, inasmuch as at the time of the loss his policy had been cancelled, and he had, within the letter and spirit of the by-law, received seven days' notice of the intent of the company to cancel his policy on a day subsequent to the giving of the notice. *Emmott v. Slater Mut. Fire Ins. Co.* 7 R. I. 562. 1863.

§ 8. A vote by the directors of a mutual insurance company, cancelling all outstanding policies, with a provision that the cancellation shall take effect on a

certain day, does not take away their authority after that day, to lay a necessary assessment upon the deposit notes. *Fayette Mut. Fire Ins. Co. v. Fuller*, 8 Allen, Mass. 27. 1864.

§ 9. The promise of an agent of an insurance company that the company will surrender a premium note in consideration of the payment, by the maker, of the amount of an assessment made thereon, and the surrender by him of his policy, is without consideration, and void. *Sands v. Hill*, 42 Barb. N. Y. 651. 1865.

See Assessments, § 53. Mutual Companies and Members of, 8. Other Insurance, 18.

CERTIFICATE.

§ 1. Printed proposals referred to by the policy required the insured to procure a certificate touching the loss, signed by the minister, church wardens and some respectable householders of the parish. The insured obtained the certificate of several householders and alleged that the minister and wardens wrongfully refused to sign it; *Held*, that the printed proposals were to be deemed part of the policy, and that compliance with the requirement of a certificate signed by the minister and wardens, was a condition precedent; and it made no difference whether they refused to sign wrongfully or rightfully; though in this case, in point of fact, the refusal was rightful. *Worsley v. Wood*, 6 Durnf. and East. 711. 36 Geo. III. *Worsley v. Wood*, 2 H. Black. 574. 36 Geo. III. 1795. Also, *Oldman v. Berwicke*, 2 H. Black. 577 note. 36 Geo. III. 1795. To same effect as to certificate, see *Routledge v. Burrell*, 1 H. Black. 254. 1789.

§ 2. Where condition of policy required, in the event of loss and before payment thereof, a certificate of a magistrate or notary public, importing that they are acquainted with the character and circumstances of the assured, and do know or verily believe that they have really and by misfortune without fraud, sustained loss by fire to the amount therein mentioned, &c.; *Held*, that such certificate was a condition precedent to a recovery of any loss, and if a certificate be procured, in which a knowledge and belief as to the "amount" of loss is omitted, it is insufficient. *Scott v. Phoenix Assurance Co.* 1 Stuart, Lower Canada, 354. 1829.

§ 3. Where the justice granting the certificate, certified therein that he was not interested in the loss, and a witness testified that the justice lived nearer the insured premises, as he thought, than another justice named, but did not know where the other justice resided, nor but what a clergyman or notary public resided nearer the premises than the justice; *Held*, that this made out a *prima facie* case of compliance with the condition of the policy on the subject, and threw the burden of proving a nearer magistrate, and the interest of the certifying justice, on the other side. *Cornel v. Leroy*, 9 Wend. N. Y. 163. 1832.

§ 4. In an action against an insurance company for a loss by fire, the declaration averred that certain affidavits, required by the conditions of the policy, were made by A. B. and C. D.; *Held*, that proof of affidavits by such parties was indispensable, as well as that the affidavits should strictly conform to the terms of the policy. *Alderman v. West of Scotland Ins. Co.* 5 Upper Canada, K. B. 37. 1830.

§ 5. Where the nearest officer, who was a clergyman, certified as to the plaintiff's character, and that he verily believed that the fire was the result of misfortune, and without any fraud or evil practice, but declined certifying.

as to the amount, solely upon the ground of not having any such knowledge of the amount of property consumed as to justify him in making any such certificate; *Held*, not to be a compliance on the part of assured with a condition in the policy requiring a certificate of the amount of the loss or damage sustained by the fire. *Roumage v. Mechanics' Fire Ins. Co.* 1 Green, N. J. 110. 1832.

§ 6. An article provided that "all persons assured by this company, sustaining any loss or damage by fire, are forthwith to give notice to the company; and as soon as possible thereafter, deliver in a particular account of their loss," &c.; "and shall procure a certificate," &c.; *Held*, that the words, "as soon as possible," did not apply to the certificate, which was only required to be produced within a reasonable time. In this case the original certificate was first objected to at the trial and the objection was sustained in the supreme court; and immediately afterward, five years after the loss, insured procured another and satisfactory one; *Held*, that this delay was not unreasonable. *Columbian Ins. Co. v. Lawrence*, 10 Pet. U. S. 507. 1836.

§ 7. A stipulation, "that the assured was not entitled to recover or sue for a loss until affidavit and proper certificate of loss are produced," is a condition precedent to the right of action by the assured. *Columbian Ins. Co. v. Lawrence*, 10 Pet. U. S. 507. 1836. *Columbian Ins. Co. v. Lawrence*, 2 Pet. U. S. 25. 1829.

§ 8. Where the condition in policy required that the magistrate should state in his certificate, that he is "acquainted with the character and circumstances of the person or persons insured, and that having investigated the circumstances in relation to such loss, does know or verily believe that he, she, or they really, and by misfortune, and without fraud or evil practice, hath or have sustained, by such fire, loss and damage to the amount therein mentioned," and where the certificate of the magistrate was, that

he was acquainted with the insured, and had examined the circumstances attending the fire, and was satisfied and did verily believe that the insured, by misfortune, and without fraud or evil practice, sustained damage or loss by said fire to the amount of the buildings mentioned in the proofs, but did not state that he was acquainted with the character and circumstances of the insured, and did not state the amount of loss and damage sustained; *Held*, that though not in precise language of the condition, yet it was a sufficient compliance. *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. N. Y. 385. 1836.

§ 9. Where two nearest magistrates refused the certificate, and that of the next nearest was obtained; *Held*, that a condition of the policy, requiring a certificate from the magistrate most contiguous to the fire, was not complied with, and the insurance not recoverable. *Leadbetter v. Ætna Ins. Co.* 13 Me. 265. 1836.

§ 10. The policy required a certificate from the magistrate or notary most contiguous to the fire. It appeared that a notary lived a few feet nearer the fire than the certifying magistrate, but whether his office was nearer did not appear. It was held that the office might be regarded in ascertaining the magistrate most contiguous; and further that the maxim, *de minimis, &c.*, applied, and the court would not go into a nice calculation touching the discrepancy of a few feet in the distances. It further appeared that the certificate was defective, and the agent made written objections, but did not specify the defects, and refused to let assured see the original certificate deposited with him; and the court refused to consider the defects. It was the duty of the company to point out the defects and give every facility for their correction. *Turley v. North American Fire Ins. Co.* 25 Wend. N. Y. 374. 1841.

§ 11. If certificate were not that of the nearest magistrate, and the company refused to pay on other grounds, they were held to have waived the objection. *O'Niel v. Buffalo Fire Ins. Co.* 3 Comst. N. Y. 122. 1849.

§ 12. Where policy required a certificate of a “magistrate or notary public, (most contiguous to the place of the fire, and not concerned in the loss or related to the insured,)” and assured applied to the nearest magistrate, who was in every way qualified to grant it, but refused to do so, and assured, thereupon, obtained a certificate of another magistrate over a mile distant; *Held*, that any difference in point of distance, from the place where the fire occurred, between the residence of the justices, was “material”—made so by the express terms of the contract—and the jury were bound to regard such difference in distance, as material, without any further inquiry on the subject. *Protection Ins. Co. v. Pherson*, 5 Port. Ind. 417. 1854.

§ 13. Where a company, after receiving a certificate, which was not in compliance with the condition of the policy, entered upon an investigation of the loss, without immediately objecting to the certificate, and offered to pay a certain amount, which was refused by assured, and then notified him that “they should expect a strict compliance with the conditions of the policy and require the production of a certificate from the nearest notary;” *Held*, that these facts did not, as a matter of law, establish a waiver of the company’s right to demand a strict compliance with their condition, but it was for the jury to decide whether there had been such waiver. *Noonan v. Hartford Fire Ins. Co.* 21 Mo. 81. 1855.

§ 14. Where policy required, among other things in event of loss, the certificate of a magistrate most contiguous to the fire, &c., and the assured obtained the certificate of a magistrate fourteen miles distant from the fire, when other magistrates were nearer, and some even in the village where the fire occurred, and the magistrate granting the certificate, at time of making it, called attention of the assured to the fact that he was not most contiguous, but assured yet persisted in having him make it; *Held*, that

such certificate was insufficient, and not in compliance with the condition. *Lampkin v. Western Assurance Co.* 13 Upper Canada, Q. B. 237. 1855.

§ 15. Where condition of the policy required the production of a certificate of a magistrate nearest to the fire, and not interested in the loss, or related to the insured, and after the fire the assured obtained a certificate from the nearest magistrate, which did not conform with the requirements of the policy, and subsequently obtained two other certificates, which were in conformity with the policy, from magistrates residing at a greater distance from the fire than the first magistrate; *Held*, that the condition was binding, and must be complied with, and that as there had not been a compliance in this case, assured could not recover. *Noonan v. Hartford Fire Ins. Co.* 21 Mo. 81. 1855.

§ 16. Where assured made statements of loss, and verified them by affidavit; and appraisers also certified to the amount of the loss; but the certificate of the magistrate was defective, in that it only stated that he had made diligent inquiries as to the cause of the fire; without making the other statements required by the condition of the policy; *Held*, that it was not a fatal objection when taken at the trial for the first time. *Bilbrough v. Metropolis Ins. Co. of N. Y.* 5 Duer, N. Y. 587. 1856.

§ 17. Where policy was issued to K., and made payable to W., and provided that in case of loss, the insured should deliver to the insurer a particular account, &c., of such loss, and that he should procure a certificate under the hand and seal of a magistrate or notary public (most contiguous to the place of fire and not concerned in the loss as a creditor, or otherwise related to the assured); *Held*, that as it did not appear that W. had any legal interest, it was not necessary to state that he was not related to the notary. *Ketchum v. Protection Ins. Co.* 1 Allen, N. B. 136. 1848.

§ 18. The stipulation in the condition of a policy, that affidavit of the loss shall be made before the nearest magistrate, is merely directory and cannot be construed as a condition precedent to the liability of the insurer. So that, although two magistrates were nearer than the one whose affidavit was obtained, but they were creditors of assured, that of the third is a sufficient compliance with condition. *Ætna Fire Ins. Co. v. Miers*, 5 Sneed, Tenn. 139. 1857.

§ 19. Assured made up his statement of loss irregularly, and upon receipt of same, the secretary, by letter, called his attention to the condition of the policy upon the subject of preliminary proofs and magistrate's certificate, and requested him to have them made in accordance with said condition. The assured then drew up a statement, verified by oath of himself and wife, as to value of goods in the building at time of fire, but did not say whether they were destroyed or not, or what was the amount of his loss by such fire. The magistrate's certificate was also defective in this, that whilst testifying that he verily believed that assured had sustained loss to the amount of eight hundred dollars, there was nothing to show that the loss might not have been on other property, not insured. The company received these amended proofs and made no objection to them; *Held*, that they were clearly not in compliance with the condition endorsed on the policy, and that assured could not therefore recover; *Held*, also, that mutual insurance companies are not precluded from making such conditions. *Langel v. Mutual Ins. Co. of Prescott*, 17 Upper Canada, Q. B. 524. 1859. See also, *Mann v. Western Ins. Co.* 17 Upper Canada, Q. B. 190. 1859. But see the last case, post § 22.

§ 20. Where policy required "certificate of magistrate most contiguous to the fire," and upon trial it was proven, that several magistrates or notaries had their places of business nearer to the fire than the place of business of the magistrate whose certificate had been furnished, but there was no evidence that their places of residence were

nearer to the fire than that of the one who gave the certificate; *Held*, that the certificate was sufficient, and that distances would not be nicely calculated to ascertain who was the nearest magistrate, where the one signing was near by and acquainted with all the circumstances. *Longhurst v. Conway Fire Ins. Co.* U. S. D. Ct. Iowa, Northern District, Oct. 1861.

§ 21. Where in a certificate, the notary testified that his residence was nearer than that of any other notary or magistrate, and it appeared that there was a magistrate's office across the street from the fire and somewhat nearer the fire than the residence of the notary granting the certificate: *Held*, that the condition of the policy requiring a certificate of a magistrate or notary public, most contiguous to the fire, was substantially complied with, or if it was not, had been waived by the failure on the part of the insurers to object to it, and refusal to pay the loss on other grounds. *Peoria Marine & Fire Ins. Co. v. Whitehill*, 25 Ill. 466. 1861.

§ 22. The plaintiffs brought an action against these defendants on a policy of insurance, which provided that the assured should "give immediate notice of any loss or damage by fire within fifteen days, to the agent of the company," &c., &c., and, "as soon after as possible," should deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation; * * * that they should also make a declaration and produce certain certificates specified; and that "until such proofs, declarations and certificate were produced, the loss should not be payable." At the trial the notice required was proved, but the certificate and affidavit produced were afterwards held by the court to be insufficient, and a nonsuit was entered. (See ante § 19.) The plaintiffs then, about eleven months after the fire, furnished a new and sufficient affidavit and certificate, and brought another action, in which the defendants pleaded that the plaintiffs did not as soon after the fire as possible deliver

these papers. It appeared that when the first papers were furnished, defendants objected to their sufficiency, and that others were a few days after delivered, to which no objection was made, until the first trial; *Held*, that the words, "as soon as possible," must be construed to mean within a reasonable time under the circumstances; and that it was properly left to the jury to say, whether, considering all the facts, the plaintiffs had complied with the condition by furnishing the second set of papers, and was not a question of law upon which the judge should have decided. The plaintiffs, while in partnership, had purchased the land, on which they afterwards built the mill in question, which was burned, from one A., who held their bond for the balance of the purchase money. Before the fire they dissolved partnership by a deed, in which it was agreed that Mann should wind up the business, and should hold the "mill property" for his own use, but no regular conveyance of it had been executed; *Held*, that the other partner, Hobson, had sufficient interest to enable him to join in suing on the policy. That the affidavit and magistrate's certificate, last furnished, were sufficient, though Mann, who alone made the affidavit, was described as solely interested in the property, and the certificate stated the loss as his only. *Mann v. Western Assurance Co.* 19 Upper Canada, Q. B. 314. 1860.

See Waiver, § 2.

CHANGE OF VENUE.

§ 1. Motion for change of venue to county where fire occurred, founded on affidavit, "that to enable defendants to bring their defense fairly and fully before a jury, it will be necessary that the said jury, or some of them, should have an opportunity of viewing the shop in which

the said fire took place," &c. Affidavit held insufficient. It should state the reason why such a view was necessary to the defense. *McLoughlin v. Royal Exchange Assurance Co.* 9 Irish Law, 510. 1844.

§ 2. In this case, on an affidavit like the above, venue was changed. *McDonnell v. Carr*, Hayes R. 375. 1832.

CLASSIFICATION OF RISKS.

§ 1. Where the charter of a mutual company provided that "the corporation may divide applications for insurance into two or more classes, according to the degree of hazard, and the premium notes shall not in such case be assessed for the payment of any losses, except in the class to which they belong;" *Held*, that such provision was in contravention of the general act of 1849, New York, for the organization of mutual insurance companies, and was, therefore, invalid. *Thomas v. Achilles*, 16 Barb. N. Y. 491. 1853.

§ 2. Where a mutual company was divided into two classes called the "merchants" and "farmers" departments, and an assessment made on a note in the "merchants'" department was resisted because the company had not shown that losses had occurred in the "merchants'" department, and that, consequently, there were debts which the makers of the premium notes given in that department were obliged to pay; *Held*, that the debts which accrued from losses in either of the departments, were the debts of the company, and that an assessment to pay such losses would be an assessment to pay the debts of the company. That the company could not apply the proceeds of an assessment upon the premium notes in one department to pay losses which had occurred in the other, but it could lawfully order an assessment

upon the premium notes to pay its debts, taking care to apply the proceeds of the assessment according to its charter and by-laws. *Kelly v. Troy Fire Ins. Co.* 3 Wis. 254. 1854.

§ 3. Where a charter of a mutual insurance company provided for a division of all risks into four classes, and conferred upon the directors the power of determining rates and making and issuing all policies of insurance, and a by-law was made defining what kind of property should be insured in the several classes, and the directors had a full knowledge of the fact that a tannery to be insured was propelled by steam and belonged to the 4th class, instead of the 3d class, into which it was put; *Held*, in an action on the premium note, that the policy was not void, that the note was valid, and that the action of the directors, though contrary to by-laws, was yet within the scope of their authority, expressly conferred upon them by the charter, and, therefore, binding. *Union Mut. Fire Ins. Co. v. Keyser*, 32 N. H. 313. 1855.

§ 4. The Union Mutual Insurance Company was organized under the act of April 10, 1849, in New York. The 10th section made it the duty of the corporators to declare, in their charter, "the mode and manner" in which they were to exercise their corporate powers. And they declared in the 11th section of their charter, that the corporation might divide applications for insurance into two or more classes, according to the degree of hazard; and that the premium notes should not in such case be assessed for any losses, except in the class to which they should belong; *Held*, that this provision of the charter did not conflict with any provision in the act under which it was formed. In an action upon a premium note, given to this company, for assessments; *Held*, that the maker of the note was estopped from setting up the invalidity of the charter in defense. *White v. Coventry*, 29 Barb.

N. Y. 305. 1858; referring also to *White v. Selover*, November term, 1858; and *Sheldon v. Roseboom*, same court, as deciding the same point.

§ 5. A mutual insurance company, organized under the New York General Insurance Companies' Act of April 10, 1849, may divide its risks into classes, according to the degree of hazard, and assess the premium notes only for the payment of the losses happening in the class to which such notes belong. *White v. Ross*, 15 Abb. Pr. 66. 1860.

§ 6. If a mutual company divides its applications for insurance into classes, one of which is the "hazardous department," and a premium note is in that department, the maker is first liable to contribute for losses in that department; but, if the losses do not exhaust such note, what is left is applicable to the payment of losses in the other departments, during the running of his policy. *Sands v. Sanders*, 28 N. Y. 416. 1863.

CONCEALMENT.

§ 1. Insurance by the governor of a fort in the East Indies, interest or no interest, against any European enemy, and the fort was taken by the French. Defendant defended on the ground of concealment, showing, first, that the governor did not disclose the condition the place was in; second, that he declared in his letters that he imagined the French would attempt the fort; third, a letter announcing a design to surprise the fort a year before, which had been abandoned; fourth, that he antici-

pated a Dutch war. Policy held valid, the court saying, "There are many matters as to which the insured may be innocently silent: 1st. As to what the insurer knows, however he came by that knowledge; 2d. As to what he ought to know; 3d. As to what lessens the risk. An underwriter is bound to know political perils, &c." *Carter v. Boehm*, 1 W. Black. 593, 6 Geo. III; same case, 3 Burrows, 1905. 1766.

§ 2. The shop of a boatbuilder took fire, but it was put out in half an hour, as was supposed. The owner of a warehouse adjoining, immediately procured insurance on the same, without notifying the underwriters of the fire in the shop. Two days after, the shop again got on fire and was consumed and the warehouse along with it. The jury acquitted the insured of intent to defraud, but thought the insured should have informed the insurance office of the fire in the shop. Motion to set aside the verdict and for new trial overruled. *Buffe v. Turner*, 6 Taunt. 338, (1 E. C. L. 643.) 1815.

§ 3. In an action on a policy by assured, the jury were held to have been correctly instructed, that if certain facts, as a threat to burn the building insured, were known to plaintiff, and were not made known to the company, and were material to the risk, they should find for the defendants, although the plaintiff did not suppose there was any particular reason to fear. *Curry v. Commonwealth Ins. Co.*, 10 Pick. Mass. 535. 1830.

§ 4. The New York Insurance Company, after issuing a policy on a "stock of dry goods," learned that the assured was a man of bad reputation, and had burnt up one or two houses before. They then re-insured the risk, with the New York Bowery Insurance Company, withholding the information they had received. *Held*, that the failure to make known the information to the re-insurer, whether from design or mistake, would avoid the

policy of re-insurance, if the information was material to the risk, or would have induced a higher rate of premium, if known. *New York Bowery Ins. Co. v. New York Fire Ins. Co.* 17 Wend. N. Y. 359. 1837.

§ 5. If assured is induced to insure by an attempt to set fire to an adjacent house, the destruction of which would necessarily have destroyed his own, and conceals the fact from the underwriters, he cannot recover. *Walden v. Louisiana Ins. Co.* 12 La. 134. 1838.

§ 6. An inadvertent omission of facts, if material to the risk, and such as the party insured should have known to be so, will render the policy void. *Dennison v. Thomaston Mut. Ins. Co.* 20 Me. 125. 1841.

§ 7. The tenant or lessee of premises effecting insurance on stock of goods is not bound to disclose or communicate to the insurers the names or pursuits of sub-tenants living on the premises. If insurers wish to guard against the risk from certain pursuits or occupations of tenants or sub-tenants, they have it in their power to insert in the policy a warranty to that effect, which being a condition precedent, whether material or immaterial, must be complied with, before any action can be maintained on the policy. *Lyon v. Commercial Ins. Co.*, 2 Rob. La. 266. 1842.

§ 8. If premises were partly occupied by "gamblers," and the underwriter made objection to the vicinity of another gaming establishment, and assured did not make known the presence of "gamblers" in the premises to be insured, it would avoid the policy, if jury should find that the risk was thereby increased. *Lyon v. Commercial Ins. Co.* 2 Rob. La. 266. 1842.

§ 9. If insurer takes risk, without inquiry, and relying on his own knowledge, to avoid the policy there must exist something unusual to enhance the risk. If insur-

ance is on cotton factory, and lamps causing the loss are used in the picking room, it must be shown, to avoid the policy, that the use of lamps in the picking room was unusual. *Clark v. Manufacturing Ins. Co.* 8 How. U. S. 235. 1850.

§ 10. Where the constitution and by-laws of a mutual insurance company required nothing further from assured than an application for insurance, and where they provide for a survey by the company, and, under such policy, "on personal property in a mill," the assured did not make known the existence of a "corn kiln" attached to the mill, and from which the fire originated; *Held*, that in the absence of any inquiry on the subject, the assured was not bound to disclose the existence of such "corn kiln." *Satterthwaite v. Mutual Beneficial Ins. Co.* 14 Penn. St. 393. 1850.

§ 11. At the time of application for insurance on "tavern, woodhouse, &c., assured had commenced preparation for erecting a new building near the ones to be insured, but did not notify insurers of such intention, no inquiries having been made on the subject. *Held*, that the failure to communicate such intention to the insurers, was not a concealment that avoided the policy. *Gates v. Madison County Mut. Ins. Co.* 1 Seld. N. Y. 469. 1851.

§ 12. Where the omission to state certain facts in the application, is relied on in defense to an action on the policy, the question presented, in the absence of warranty, would be upon the materiality of the fact concealed to the risk, and that is a question for the jury, and ought to be submitted to them. *Gates v. Madison County Mut. Ins. Co.* 2 Comst. N. Y. 43. 1848. *Gates v. Madison County Mut. Ins. Co.* 1 Seld. N. Y. 469. 1851.

§ 13. The fact of a pending litigation, affecting the premises insured, not having been communicated to the insurer at the time of executing the policy, will not avoid the policy. *Hill v. Lafayette Ins. Co.* 2 Mich. 476. 1853.

§ 14. An agreement that the builder would receive lots of land as a part payment for work done upon a house, should be communicated at the time of effecting the insurance, and the value of such land would be deducted from the amount to be paid in case of loss. *Protection Ins. Co. v. Hall*, 15 B. Monroe, Ky. 411. 1854.

§ 15. The neglect to disclose all circumstances, material to the risk, even through inadvertence, and without fraud, will vitiate the policy. *Beebe v. Hartford Mut. Ins. Co.* 25 Conn. 51. 1856.

§ 16. When several fires have occurred in and about the house, before applying for insurance, a failure to disclose such facts to agent is a concealment fatal to the policy; but if enough is made known to put the company or agent upon inquiry for more, and they fail to inquire, the insured is not bound to force his knowledge upon them. *Beebe v. Hartford Mut. Ins. Co.* 25 Conn. 51. 1856.

§ 17. An agreement between a mortgagor and mortgagee, that the mortgagor was to pay the premiums for an insurance, in the names of the mortgagees, as a general rule ought to be disclosed, and, not having been disclosed, in this case, a new trial was granted, to submit the question of its materiality to the jury. *Kernochan v. New York Bowery Ins. Co.* 5 Duer, N. Y. 1. 1855. Reversed 17 N. Y. 428. 1858.

§ 18. Where specific descriptions of the property are required by the terms of an insurance office, which terms are referred to and incorporated as part of the conditions of the policy of insurance; *Held*, that the suppression of an immaterial fact does not invalidate the policy. *Whitehurst v. Fayetteville Mut. Ins. Co.* 6 Jones' Law, N. C. 352. 1859.

§ 19. The policy stipulated that the representations in the application should be a warranty on the part of assured, and contain a just, full and true exposition of all the facts and circumstances in regard to the condition, situation and value of the property insured. The application stated that there was a carpenter shop near the building sought to be insured. *Held*, that the application was not required to state in what manner the shop was heated; unless, at least, there was something unusual, something not "customary," in the mode of heating. *Girard Fire & Marine Ins. Co. v. Stephenson*, 37 Penn. St. 293. 1860.

§ 20. Insurance was on a stock of goods described as contained in a certain store. Defense was, that assured had failed to communicate the fact, that the upper part of the building was occupied for a dwelling. *Held*, that the concealment of that fact was not material, unless a disclosure of it would have induced the insurer to decline the risk, or would have enhanced the premium. That in contracts of fire insurance, it was sufficient, if the applicant for insurance made full and true answers to the questions put to him by the insurer in respect to the subject of insurance; he is not answerable for an omission to mention the existence of other facts about which no inquiry is made, unless he knows such facts to be material, and intentionally fails to communicate them. *Boggs v. American Ins. Co.* 30 Mo. 63. 1860.

§ 21. A suppression or misrepresentation of material facts, though from ignorance, mistake, or negligence, stands on the same ground in its effect on a policy, as if such suppression or misrepresentation were wilful. But the principle on which this rule is founded, can have no application to the conduct of the insured subsequent to the making of the contract. *Miller v. Western Farmers Mut. Ins. Co.* 1 Hand, Ohio, 208. 1854.

§ 22. It is not sufficient to aver in a plea to an action upon a policy, that when the application for insurance

was made, the insured concealed a fact material to the risk, and which would have increased it if known. It must also appear that the insured knew of the existence of the fact, and that the fact itself was not open and notorious at the time to all parties. It is not every fact within the knowledge of the insured that he is bound to disclose, and if such facts as the law will require him to disclose are within the knowledge of the insurers, or so connected with the subject insured, that his knowledge may be fairly inferred, the allegation of concealment is unsupported. *Merchants' and Manufacturers' Mut. Ins. Co. v. Washington Mut. Ins. Co.* 1 Hand, Ohio, 408. 1855.

§ 23. An omission, when application is made for a policy, to disclose to the insurers repeated incendiary attempts to destroy the property of the applicant, will not avoid an insurance effected thereon. *Clark v. Hamilton Mut. Ins. Co.* 9 Gray, Mass. 148. 1857.

§ 24. Where it is provided in the application for insurance, which is made a part of the policy, that any concealment of the condition or character of the property will make the policy void, and the applicant represented the property free from incumbrance, when there was at the time a mortgage upon a part of it; *Held*, that such representation was a breach of the contract, rendering the policy void, and this, whether the false representation were by mistake or design. *Gould v. York County Mut. Fire Ins. Co.* 47 Me. 403. 1859.

§ 25. A misrepresentation or concealment in regard to the title of the assured in the property will avoid a policy issued by a mutual insurance company, whose charter, subject to which the policy is issued, makes the premium notes liens on the property insured. *Mutual Ins. Co. v. Deale*, 18 Md. 26. 1861.

§ 26. An insurance company is chargeable with knowledge of all the facts stated by an applicant for insurance to the company's agent, respecting the applicant's title and interest in the insured premises. And if the applicant, on applying to such agent for insurance, truly state to him the real condition of the property, he cannot be held to have made any misstatement, or practiced any concealment in reference to the company, notwithstanding the written application drawn up by the agent varies from such statement. *Hodgkins v. Montgomery County Mut. Ins. Co.* 34 Barb. N. Y. 213. 1861.

See Application, § 21, 28, 39. Dependency of Policy and Premium Note, 1. Distance of Other Buildings, 4, 5, 11. Encumbrance, 3. Fraud, 12. Insurable Interest, 6. Questions for Court and Jury, 5, 8. Title, 1, 6, 58.

CONSEQUENTIAL DAMAGES.

§ 1. Policy on W.'s "interest in the ship Inn." *Held*, that insured could not recover for loss of custom or profits while the Inn was repairing. *In Re Wight & Pole*, 1 Adolph. & Ellis, 621, (28 E. C. L. 294.) 1834. *Sun Fire Office v. Wright*, 3 Nev. & Man. 819, (28 E. C. L. 627.) 1834.

§ 2. The general principle that the assurers are bound to adjust a loss upon the principle of replacing the assured, as near as may be, in the situation they were in before the fire, has never been understood to extend to the profits or fruits which the latter was drawing or might have drawn from the thing insured. *Leonarda v. Phoenix Assurance Co. of London*, 2 Rob. La. 131. 1842.

§ 3. Under policy of insurance upon a house, with a condition that in case of loss the assurer may either rein-

state the building, or pay the amount of the loss, as soon as proved, rent for the period occupied in re-building or repairing cannot be recovered as part of the indemnity to be assured. Such rent forms a distinct insurable interest. *Leonarda v. Phoenix Assurance Co. of London*, 2 Rob. La. 131. 1842.

§ 4. Insurance against fire does not cover consequential damages from loss of occupancy while the buildings are under repair, nor loss of profits that might have been made by occupant by his trade, nor wages of servants which occupant had to pay, though, in consequence of the fire he could not employ them. *Menzies v. North British Ins. Co.* 9 Cases in the Court of Sessions, N. S. 694. 1847.

§ 5. The assured cannot recover consequential damages; that the only loss or damage insured against, are those happening by fire, and if the company neglect to repair or make good the same to the assured, the only compensation to which he is entitled, is the actual loss by fire, and interest on that sum from the time it was due. *Elmaker v. Franklin Ins. Co.* 5 Penn. St. 183. 1847.

§ 6. On an insurance against loss or damage by fire on a building simply, and its injury or destruction by the peril insured against, the assured cannot recover for his loss occasioned by the interruption or destruction of his business carried on in such building, nor for any gains or profits which were morally certain to enure to him if it had remained uninjured to the expiration of his policy. *Niblo v. North American Ins. Co.* 1 Sandf. N. Y. 551. 1848.

CONSTRUCTION.

§ 1. The order of a mayor to blow up a building to prevent the spread of a conflagration, though an illegal exercise of power, is not an "usurped power" within the meaning of that term in the policy. The "usurped power" provided in for a policy means "an usurpation of the power of the government," and not a mere excess of jurisdiction by a lawful magistrate. *City Fire Ins. Co. v. Corlies*, 21 Wend. N. Y. 367. 1839.

§ 2. In construing a policy, a particular description, which is clearly false, will be rejected in order to give effect to other descriptive words, when such words are sufficient to define the building intended to be described. In such a case the false description may be rejected as surplusage. *Heath v. Franklin Ins. Co.* 1 Cush. Mass. 257. 1848.

§ 3. Where policy was issued on a brick building, described as follows: "with a composition roof, occupied by several tenants, and connected by doors with the adjoining building, situate at the corner of Charles Street and Western Avenue, in Boston. A cabinet maker's shop is in the building;" *Held*, that the words "situate at the corner of Charles Street and Western Avenue, in Boston," applied to the building insured, rather than to the building adjoining the one insured. *Heath v. Franklin Ins. Co.* 1 Cush. Mass. 257. 1848.

§ 4. The insurance of the plaintiffs was expressed in the policy to be "on their paper mill and permanent fixtures, \$1,200; on their machinery, \$800, on condition that the applicants take all risk from cotton waste, situate as described in their application." *Held*, that the clause "on condition that the applicants take all risk from cot-

ton waste," did not constitute a condition in its legal sense; but was to be regarded as a proviso, expressing the intention of the defendants not to insure against the risk of fire originating in cotton waste, nor to pay a loss caused by fire thus originating. If the company claim that the loss was not within the policy, because of this proviso, it is for them to allege and prove it. *Kingsley v. New England Mut. Fire Ins. Co.* 8 Cush. Mass. 393. 1851.

§ 5. Where policy provided that "if the insured or his assign shall hereafter make any other insurance," &c.; *Held*, that the word assigns, referred only to one who had acquired an interest in the property insured and had the policy assigned to him, with the consent of the company. *Holbrook v. American Ins. Co.* 1 Curtis C. C. U. S. 193. 1852.

§ 6. Where the by-laws prohibited the insured from altering the building, and provided against any increase of risk, by act of assured; *Held*, that the words "insured" and "assured," applied to the party whose interest was originally insured, and not to a lessee under him, nor to a party to whom, in case of loss, the policy was made payable. *Sandford v. Mechanics' Mutual Fire Ins. Co.* 12 Cush. Mass. 541. 1853.

§ 7. In answer to the question in application, "whether the lamps used in the woolen factory were open or covered?" the reply was "covered." It appearing that an open lamp was commonly used to light up with; *Held*, that the question referred to lamps that were habitually used, and not to the lamp used for lighting up with, and that there was, therefore, no misrepresentation. *Howard Ins. Co. v. Bruner*, 23 Penn. St. 50. 1854.

§ 8. A policy issued to M. and assigned to W., as collateral security, provided that, "if the insured shall neglect for the space of ten days, when personally called

upon, or after notice in writing, to pay any assessment, the risk of the company on the policy shall be suspended until the same is paid." *Held*, 1st, that a failure to comply with this provision would be a good defense to an action on the policy; and 2d, that the notice of assessment was properly given to M. the original insured, unless it appeared that W. the assignee, had given a new deposit note or assumed the liability for the payment of assessments, in which case W. and not M. should be notified. *Bowditch Mut. Fire Ins. Co. v. Winslow*, 3 Gray, Mass. 415. 1855.

§ 9. When policy makes survey and representations warranties, the court will not extend the effect of any statement therein to the prejudice of the assured. *Sayles v. North Western Ins. Co.* 2 Curtis, C. C. U. S. 610. 1856.

§ 10. In application, in reply to questions as to distance of other buildings, assured answered: "House and wood-house connected. No other buildings within four rods, except the ice-house." It appeared in evidence that in rear of the ice-house was a small building, three and half feet high in rear, and six feet high in front, divided by a partition of boards, and called a "hog-house" and "hen-house." *Held*, that they were not buildings within meaning of the application, and evidence as to the increase of risk from them, was not competent. *White v. Mutual Fire Assurance Co.* 8 Gray, Mass. 566. 1857.

§ 11. A policy of insurance, in respect to the rules by which it is to be construed, and the principles by which it is to be governed, does not differ from other written mercantile contracts. It is a contract of indemnity, and the right to that indemnity, vested by the contract, can be taken away only on principles alike applicable to other instruments of that character. *Miller v. Western Farmers' Mut. Ins. Co.* 1 Hand, Ohio, 208. 1854.

§ 12. In an application for insurance, which provided that questions not answered should be construed most favorably to the risk, the applicant left unanswered a question whether there was any livery-stable in the vicinity. In an action on the policy of which this application was made part; *Held*, that the jury, if there was a livery-stable in the vicinity at the time of the application, were to determine what was the meaning of the question and of the word "vicinity;" and whether there was a livery-stable in that vicinity, having reference to the situation of the building in which the property insured was situated, the situation of other buildings, and the locality, as ascertained from the contract and evidence. *Haley v. Dorchester Mut. Fire Ins. Co.* 12 Gray, Mass. 545. 1859.

§ 13. An endorsement on a policy of receipt of an additional premium for "carpenter's risk" in extending a store-room adjacent to the building in which the property insured was situated, cannot be construed into any engagement to insure goods in the extended store-room, although a portion of the building originally insured was removed, and its place occupied by the extended store-room. *Lycoming County Ins. Co. v. Updegraff*, 40 Penn. St. 311. 1861.

§ 14. The law of the relation between insurers and the assured is the policy of insurance, with all its clauses, conditions, and stipulations, by which their mutual rights and liabilities are defined and measured. *West Branch Ins. Co. v. Helfenstein*, 40 Penn. St. 289. 1861.

§ 15. Where a policy is entirely consistent with the terms of the application, free from ambiguity, and susceptible of a consistent construction in all its parts, although there be a mistake in the insurance effected not attributable to the insurer, the Court will not look beyond the terms of the policy in ascertaining its meaning and legal effect. *Baltimore Fire Ins. Co. v. Loney*, 20 Md. 20. 1862.

§ 16. For a proper understanding of the rights and obligations of the parties to an insurance effected by a mutual insurance company, the charter of the company, a policy issued by it, and the conditions annexed thereto, must be read together. *Hyatt v. Wait*, 37 Barb. N. Y. 29. 1862.

§ 17. A vote by the directors of an insurance company, indefinitely to postpone the subject of a loss, will be construed as a refusal to allow any thing on account of it. *Patrick v. Farmers' Ins. Co.* 43 N. H. 621. 1862.

§ 18. A clause in a policy of insurance, that it should "cease at and from the time the property hereby insured shall be levied on or taken into possession or custody, under any proceeding at law or equity," is to be construed as meaning an actual levy and change of possession under it. A mere notice of levy by the officer charged therewith to the defendants at their store, without his taking the goods insured into possession or custody, though good as a levy, will not defeat the policy. *Commonwealth Ins. Co. v. Berger*, 42 Penn. St. 285. 1862.

§ 19. Ambiguous words in a policy of insurance may be construed by extrinsic evidence of accompanying circumstances and the usages of the business in which the property insured was employed. *New York Belting & Packing Co. v. Washington Fire Ins. Co.* 10 Bosw. N. Y. 428. 1863.

§ 20. Under the usual provision in a policy of insurance, that the conditions annexed are "to be resorted to in order to explain the rights and obligation of the parties thereto, in all cases not herein otherwise specially provided for," such conditions do not define the rights and obligations of the parties under any contingency provided for in the body of the policy. Hence, where a clause in the body of the policy provides that the insurance shall

be suspended during any increase of the risk from specified causes, and the conditions annexed provide that the policy shall become void by any increase of the risk, an increase of risk such as is specified in the clause in the body of the policy, does not avoid but merely suspends the policy. *Mayor, &c., of N. Y. v. Hamilton Fire Ins. Co.* 10 Bosw. N. Y. 537. 1863.

§ 21. A policy of insurance upon a two-story factory, with attic and basement, contained a provision that there should be "water on each floor, with hose." It appeared that the factory was provided with a steam-pump in an adjoining building and a force-pump in the basement, connected with a water-pipe passing through the two stories above to a tank in the attic, which was so constructed that its overflow would flood the attic floor, that hose was kept upon the premises, attached to couplings to such water-pipe in the first and second stories, by means of which and the force-pump water could be thrown upon those floors and into the basement, by the steam-pump, and that, according to the usage of the "factory parlance," neither the attic nor the basement were spoken of as "floors." *Held*, that the requirement of the policy as to water was complied with. *New York Belting & Packing Co. v. Washington Fire Ins. Co.* 10 Bosw. N. Y. 428. 1863.

§ 22. A clause in a fire-policy which provided that if gunpowder or other articles subject to legal restrictions should be kept in greater quantities, or in a different manner, than was provided by law, the policy should be void; *Held*, to have reference only to articles of an intrinsically dangerous nature, as liable to cause injury accidentally or by carelessness, and not to refer to liquors, the traffic in which was made illegal by statute. *Niagara Fire Ins. Co. v. De Graff*, 12 Mich. 124. 1863.

§ 23. A condition in a policy of insurance that it should cease from the time that the property insured

should be "levied on or taken into possession or custody, under an execution or other proceeding at law or equity," does not apply to a wrongful levy, made upon the property as belonging to another person than the insured. *Philadelphia Fire & Life Ins. Co. v. Mills*, 44 Penn. St. 241. 1863.

§ 24. From the answer to a question in an application, that the factory insured is "worked usually" certain specified hours in the daytime "in the summer," and certain specified hours "in the winter—short time now," it may be inferred that it was expected at times the factory would run nights. *North Berwick Co. v. New England F. & M. Ins. Co.* 52 Me. 336. 1864.

§ 25. Conditions and provisos in policies of insurance are to be construed strictly against the underwriters, as they tend to narrow the range and limit the force of the principal obligation. *Hoffman v. Aetna Fire Ins. Co.* 32 N. Y. 405. 1865.

§ 26. Policies of insurance are to be considered and construed as a whole, and particular clauses or passages are not to be wrested from their context so as to destroy the unity of the contract and create conflict where there should be agreement; but one part is to be elucidated by the other, so as to reconcile them, if practicable, to one common intent or design, present to the minds of the contracting parties. *Merchants' Ins. Co. v. Edmond*, 17 Gratt. Va. 138. 1866.

§ 27. Where the underwriters have left their design doubtful by using obscure language, the construction will be most unfavorable to them. *Merrick v. Germania Fire Ins. Co.* 54 Penn. St. 277. 1867.

See Application, § 25. By-Laws and Conditions, 1. Camphene, 4. Encumbrance, 9. Interest in Policy, 36. Questions for Court and Jury, 23. Renewal of Policy, 13. Responsibility of Assured for Acts of Others, 3. Risk, 22, 23. Use and Occupation, 7, 14, 21. What Property is Covered by Policy, 10, 17, 25. Written Portion of Policy, 9. 10.

CONSUMMATION OF CONTRACT.

§ 1. S., desirous to insure his wire mill, applied for £2,000, in the Phoenix of London, through an agent in Edinburgh, and for £3,000, in North British Insurance Company. The agent of the Phoenix, not knowing what premium to charge, referred to the London directory; and the officers of the other company told S. that they would take the risk and charge the same premium as the Phoenix, and that S. might consider his mill insured; and the risk was entered on their books, leaving blank for premium. The fire occurred before any conclusion was come to, as to the premium to be charged. *Held*, by a divided court, that the contract was incomplete, and that S. could not recover. *Christie v. North British Ins. Co.* 3 Cases in Court of Sessions, 360. 1825.

§ 2. The defendant, a New York insurance company, in 1818, appointed R. "surveyor of buildings and goods offered to be insured in Savannah," Georgia. In April, 1819, R. wrote to the secretary of the company that little could be done in the way of insuring, unless he was furnished with blank policies, ready signed, or unless his receipt for premiums was binding on the company until the policies could be obtained from the office. The secretary replied that "the directors are aware of the difficulty of making insurance at a distance, and will obviate it as far as consistent with the principle they had adopted, which was that no insurance shall be binding until the premium is received at their office in New York." The president of the company about the same time wrote to R. as follows: "All insurances that you may agree to make, and for which such premiums as you may deem proper shall be actually paid, and shall be received here, the office will consider as enuring at the time of the payment to you; so that in case of accident between such

time of payment and the receipt of the money here, the company will indemnify such loss; provided, however, the office shall recognize the rate of premium which you shall charge, and shall be otherwise satisfied with the risk." The company issued many policies, dating the same back to the time R. received the premium. January 5, 1820, R. executed to complainant a receipt, signed by himself as agent, for \$106.25, for insuring \$5,000, on his stock of dry goods, &c. The rate of premium charged was within the usual rate of the company on that class of risks. The goods were consumed by fire January 11. R. not sending forward the premium, and intimating that the company would not consider themselves bound by what had been done, complainant tendered the premium to the president, filed his preliminary proofs, and demanded his policy and payment; and upon refusal by the company brought his bill in chancery for relief; *Held*, that R. was not authorized to bind the company to a contract of insurance; that R.'s contracts had no force till they were assented to in New York; and that, as in this case, the company never gave their assent, no binding contract ever existed, and the bill must be dismissed. *Perkins v. Washington Ins. Co.* 6 Johns. Ch. N. Y. 485. 1822; but see section 3—Post.

§ 3. The case of *Perkins v. Washington Insurance Company*, 6 Johns. Ch. N. Y. 485, of which a statement is given in the preceding section, was appealed; and in the Court of Errors it was held, that, under the authority conferred by the letter from the president, the company could not refuse to ratify, but were bound by the contracts of their agent, R., where the premium was paid or tendered in New York, and where the risks and rates conformed to the rules and regulations of the company in other and similar cases. They could not arbitrarily reject the risk; nor could they refuse to execute a policy because a loss intervened. The decision of the court below was reversed, and the company decreed to pay the loss. *Perkins v. Washington Ins. Co.* 4 Cow. N. Y. 645. 1825.

§ 4. One H. made application to the secretary of an insurance company for insurance in behalf of plaintiff. The secretary made out and gave to H. an application and premium note for plaintiff, who, with H., lived in another town, to sign, and told H. when they were signed, to return them to him and he would return a policy of same date. The note and application were not signed by, or presented to, plaintiff, till thirteen days afterwards; and were not returned by H., to the secretary, till six days after the signing; and during these six days the fire occurred; *Held*, that the contract was incomplete, and that plaintiff could not recover. *Thayer v. Middlesex Mut. Fire Ins. Co.* 10 Pick. Mass. 326. 1830.

§ 5. Where an agreement for insurance had been made on the 30th of March, and the premium paid on that day, but the policy was not made out until some days afterwards, and in the meantime the property was destroyed, when the policy of the same date as the day on which the premium had been paid, was made out and delivered; *Held*, that the policy took effect, by relation, from the day of its date. *Lightbody v. North American Ins. Co.* 23 Wend. N. Y. 18. 1840.

§ 6. The president of an insurance company made an agreement by parol, with a firm owning some chemical works, for the insurance of five thousand dollars, on their property, to be apportioned as follows: three thousand dollars on stock, one thousand dollars on fixtures, and one thousand dollars on buildings; and told applicants that the insurance should commence on that day. Upon the return of the president to the office of the company, he made a memorandum of the agreement upon the books of the company, but no policy was made out, as a few days afterwards the applicants notified the company that they wished to have the amounts insured, differently apportioned. No premium was paid, nor was any charge made by the company against applicants on the books of the company. Whilst matters were in this condition, the

company several times requested applicants to call, and fix up the amounts as they desired them, but they neglected to do so—whereupon the company notified them, that if they did not call and complete the arrangement, they (the company) would not hold themselves liable for any loss. A few days afterwards the property was destroyed, but applicants had not then called, as requested; *Held*, that there had been no contract consummated, and applicants could not recover. *Sanford v. Trust Fire Ins. Co.* 11 Paige Ch. N. Y. 547. 1845.

§ 7. An application for insurance on an academy was made, by one interested, to an agent of a mutual insurance company, “authorized to take applications, receive premium note, and the cash payments, and forward to the company,” and the cash premium was paid, and note given for balance to such agent, who forwarded same to the company; and company agreed to issue policy, when certain alterations were made, and the order for insurance was authorized by the trustees of the building. The alterations were made, and consent of trustees obtained, and agent was notified of the same, and requested to call and see the consent, and to examine the building, which he did not do. In the meantime the building was destroyed; and the court held, that the risk commenced from the time of the notice that the conditions were performed. *Hamilton v. Lycoming Ins. Co.* 5 Penn. St. 339. 1847.

§ 8. Where a company offered to insure on certain terms by letter, and assured replied accepting the terms and enclosing the premium; the contract held to be consummated from date of mailing the acceptance, though property was destroyed before receipt of same by the company. *Tayloe v. Merchants' Fire Ins. Co.* 9 How. U. S. 390. 1850.

§ 9. Where an agent, only authorized to receive and forward applications, on which the company were to issue

policies "if approved," and their printed rules stated that policy should "bear date with application," and such agent was also authorized to receive the premium note and cash percentage thereon, and plaintiff applied for insurance on the 27th May, paid cash percentage and policy fee and gave premium note to such agent, who mailed the same on the day following, and company did not receive it until 2d June, and on 1st June the property was destroyed, whereupon company refused to issue policy, and tendered back the premium to plaintiff, who refused to receive the same, and suit for policy was brought in equity; *Held*, that the contract was consummated on 27th May, and the company were liable for the loss. *Held*, also, that the reservation on the part of the company of the right of "approval," did not give them the arbitrary right of setting aside any contract, however fair, made by their agent, but only in such cases where the agent had been imposed upon, or where the contract made by agent would operate as a fraud on the rights of the company. *Palm. v. Medina Ins. Co.* 20 Ohio, 529. 1851.

§ 10. After the approval of the application and the payment or security of the premium, the applicant is insured and can recover for his loss, although no policy may have been made out. *Goodall v. New England Mut. Fire Ins. Co.* 5 Fost. N. H. 169. 1852.

§ 11. A secretary of a mutual insurance company, by request of assured to have other property covered by his policy, sent by mail the following endorsement or memorandum, with instructions to assured to attach it to his policy: "an additional representation having been received this day, and attached to the original application of G., agent, No. 2323, the directors consent to the continuance of this policy, and may cover new machinery, wheels, drum and flume. J. E. Lang, Sec'y." In a suit upon the policy for the recovery of loss by fire to the property covered by original policy, and also to property

specified in the memorandum; *Held*, first, that the memorandum being attached to the policy, the whole might be set forth in one count as upon one policy; at least such a declaration was sufficient after verdict; second, that the memorandum was competent evidence to show that the defendants contracted to insure and did insure the new machinery, wheels, drum and flume; and as the 4th section of the by-laws, (which provided that the directors may, in their discretion, grant certificates of insurance before the papers are formally made out,) sanctioned the issuing of this certificate or memorandum, the new machinery was covered by the contract with defendants. *Goodall v. New England Fire Ins. Co.* 5 Fost. N. H. 169. 1852.

§ 12. Policy made out at request of defendant, but he refused to receive it, or pay premium, or sign note; *Held*, that there was no contract and no liability, and in action on premium note, against defendant, the company could not recovery. *Real Estate Mut. Ins. Co. v. Roesle*, 1 Gray, Mass. 336. 1854.

§ 13. Where an agent, only authorized "to receive and forward applications to the company, receive the note, and cash percentage thereon," gave a certificate to an applicant as follows: "This certifies that C. & J. have made application to the N. York Union Mutual Insurance Company, for insurance upon property specified in said application, &c., "and have given therefor a premium note of \$—, and paid cash premium \$25. If not approved by the directors, money to be refunded;" *Held*, that this was not a contract binding on insurance company, but only a proposal for a contract. Nor was an acceptance of the proposition for insurance, to be presumed merely from the lapse of six months, without a reply to the proposition for insurance. *Insurance Co. v. Johnson*, 23 Penn. St. 92. 1854.

§ 14. Where policy and application were made out, and reported by the agents to company in October, but premium was not paid or policy delivered till December following, and, at latter date, an endorsement was made upon policy by agents, changing the contract; as between insurers and assured, the contract must be treated as commencing in December. *Gloucester v. Howard Ins. Co.* 5 Gray, Mass. 497. 1855.

§ 15. A contract arises when an overt act is done, intended to signify an acceptance of a proposition, whether such overt act comes to the knowledge of the proposer or not; and unless a proposition is withdrawn, it is considered as pending until accepted or rejected, provided the answer is given in reasonable time. The acceptance of a proposal to insure for the premium offered is the completion of the negotiation; and, after the policy has been forwarded to the agent of the company for delivery, the contract cannot be rescinded without the consent of the party insured. *Hallock v. Commercial Ins. Co.* 2 Dutch. N. J. 268. 1856.

§ 16. An agent, in arrears in his account with the company, forwarded an application for insurance with the premium, \$11.25, paid by applicant. The company placed the money to the agent's credit and returned the application, saying that it must be put in the "Manufacturer's" department, and could not be taken at less than 3 per cent., or premium, \$30, which if agreed to by applicant, and the money sent with application by agent, the policy would be issued. The company then called the attention of the agent to the state of his account, and said they would not write any more policies until it was made good. The agent showed the company's letter only as far as that part of it relating to the rate, and applicant at once paid the remainder of the premium, \$18.75, making the amount asked by the company. This was on the 1st of November. On the 2d of November, the property

was destroyed by fire, and the money sent forward by the agent on the 4th November, after the fire; and the company having heard of the fire in Lockport, though not of the plaintiff's loss, acknowledged receipt of the money, but declined issuing any policy; *Held*, that when the plaintiff accepted the company's terms, and paid the premium to their agent, the contract was fully consummated and the company were liable for the loss to the amount of the insurance, although the money was not forwarded to the company until after the fire. *Held*, further, that as the latter part of the company's letter to the agent, as to the balance due from him to the company had not been shown to the assured, he could not be affected by the omission of the agent to comply with the condition annexed to the letter of the president. *Chase v. Hamilton Mut. Ins. Co.* 22 Barb. N. Y. 527. 1856.

§ 17. Boyd, a general agent, and Moody, a local agent, of the defendant company, went to the residence of the plaintiff, Bragdon, on the 7th of October, 1853, and, after certain negotiations with him, applications were prepared by Boyd, upon request to be insured from that time, and signed by plaintiff in a manner satisfactory to Boyd, who said the policies would be made without delay. Moody, the local agent, told Bragdon, that it made no difference whether he paid the cash premium at that time, or when he should take the policies, and he did not pay it. Bragdon also asked agents for a copy of the by-laws, and was told that they had none with them, but that he would be furnished with a copy on the policies. There were no rules or regulations of the company made known to plaintiff. It was also understood between the agents and plaintiff, that the policies would be made at once, (as the president of the company was in the adjoining town,) and be left with Fellows and Moody, at Waterville, and no time was fixed when Bragdon should take them. The policies were made and signed, and put into the hands of Fellows before the loss; but Fellows was afterwards ordered by the President not to deliver them,

and they were subsequently taken back. On the 10th of October plaintiff tendered the premium in gold to Fellows, who said he was also agent of the company, and, as he declined to receive it, plaintiff requested him to keep it, which he did, until the commencement of suit, when it was deposited with the clerk of the court. Fellows at the same time declined to deliver the policies. The policies provided in Article 8, "Each person shall pay, upon the execution of his policy and before its delivery, the premium thereon," &c. Article 6, "That no insurance shall take effect until the application has been approved, &c., and cash premium paid, &c." And last part of Article 12, "No insurance agent or broker forwarding applications to this office, is authorized to bind the company in any case whatever." In a suit in the above case, after the evidence was in, the court directed a nonsuit, to which plaintiff excepted, and upon appeal the exception was sustained, and new trial granted, upon the ground that from the foregoing facts, the jury might find that the right of the company to receive the cash premiums before the delivery of the policies, had been waived; and if so, the policies were effectual from the time they were left with Fellows and Moody for delivery, notwithstanding Bragdon, the plaintiff, had not received them. *Bragdon v. Appleton Mut. Fire Ins. Co.* 42 Me. 259. 1856.

§ 18. Where assured and his counsel, after a loss by fire, applied to the secretary of the company for the policy, and he stated "that he had either sent the policy to the assured by mail, or by private hand; he thought by mail;" *Held*, that such declaration was conclusive evidence against the company, upon the question of the execution and legal delivery of the instrument; and they could not, upon the trial, repudiate the representations of the secretary. *Sussex County Mut. Ins. Co. v. Woodruff*, 2 Dutch. N. J. 541. 1847.

§ 19. Application was, on the 2d of March, made to B., agent of the company to receive applications and pre-

miums and forward to the company for the insurance of a building. B. forwarded the application on the 3d of March, and the company held it under advisement until they procured a map referred to by the agent, giving the location of the risk. The application stated the insurance to be from the 10th of March, at which time another policy applicant had on the property would expire. On the 13th of March, at 12 o'clock, the company made out policy, and mailed it to agent for delivery, and on the 15th of March telegraphed agent "to return policy when it arrived, as risk not taken when burnt;" and the policy was returned when it came. On the 13th of March, a fire originated, wholly consuming the property before 8 o'clock A. M., or several hours before the policy had been made out at the office of the company. The policy, in accordance with the application, was expressed to be an insurance from the 10th of March. *Held*, 1st, that the acceptance of the proposition to insure completed the contract between the insurer and insured, and, after the policy had been sent by mail to the agent of the company for delivery, the contract could not be rescinded without the consent of the party insured; 2d, that in the absence of fraud or concealment, on the part of the assured, the company were as much bound for the loss as if it had occurred after the delivery of the policy. *Hallock v. Commercial Ins. Co.* 2 Dutch. N. J. 268. 1856. Affirmed, 3 Dutch. N. J. 645, Court Appeals, 1858.

§ 20. On the 28th of March, 1857, the agent of the company called at the house of assured, and proposed to insure it. A written application was made and signed by the assured, and a receipt given to him by the agent, acknowledging the payment of the premium. The premium was not actually paid at that time, but it was agreed that the assured might send it to the agent at his convenience. The assured was also told that his contract of insurance was complete from the date of the receipt, and that his policy would soon be ready, &c. The receipt was dated on the said 28th of March, 1857; the house was burned on

the 7th of April thereafter, and the furniture wholly or partially destroyed. The premium was sent to the agent immediately after the fire, and he accepted the money, not knowing of the fire. The company made out and sent a policy to the agent, but having heard of the fire, directed the agent not to deliver it to the assured, but to refund the premium. The agent declined to deliver the policy, and tendered the premium to the assured, which he declined to receive, and brought an action for a specific performance of the contract of insurance. *Held*, that when the company accepted the premium, and forwarded the policy to its agent, the agreement to insure was complete and ratified as of the 28th of March, 1857, and the policy became the property of the assured. *Whitaker v. Farmers' Union Ins. Co.* 29 Barb. N. Y. 312. 1859.

§ 21. B., an agent to receive and forward applications and receive the cash percentage thereon, forwarded to defendants an application of A. for insurance, fixing the rate at nine per cent. for six years, and at same time enclosed a blank premium note signed by A. to be filled up by the company. The latter required a re-survey of the premises, and upon the receipt of it, made out a policy bearing date of the 20th January, 1855, at the rate of fifteen per cent. for six years, and sent it to B. with instructions to return without charge if not satisfactory to A. At time the policy reached the agency B. was absent, and was also absent more or less from that time until the fire, which occurred on the 8th March, 1855. During that time A. asked B. if the policy had come, but B. could not say whether he had received it or not, and was not certain that he had not delivered it to A. No premium had ever been paid to the company, or tender of premium made by A., other than the blank premium note sent with the first application. The charter of the company declared that the applicant for insurance "shall, before he receives his policy, deposit his promissory note," &c., "a part not exceeding ten per cent. of which shall be immediately paid." The by-laws provided that "policies shall take effect at 12 o'clock, noon,

on the day of approval at the office of the company, and shall be binding thereafter, provided the premium or ten per centage on the premium note has been paid," and that "ten per cent. on the premium note shall be paid in all cases and endorsed on the policy." *Held*, that the policy was not binding on the company, first because there had been no acceptance of it by A., and second, because the giving of the note and payment of the prescribed ten per cent. were conditions precedent to taking effect of policy. *Wallingford v. Home Mut. Fire Ins. Co.* 30 Mo. 46. 1860.

§ 22. To constitute a valid contract of insurance, the minds of the parties must meet as to the premises and the risk, as to the amount insured; as to the time the risk shall continue; and as to the premium. *Baptist Church v. Brooklyn Fire Ins. Co.* 28 N. Y. 153. 1863.

§ 23. Where an agreement of insurance was made between the parties by their agents on the 20th, and on the night of the same day the property was destroyed by fire; on the morning of the 21st, the policy was executed, delivered and received in perfect accordance with the agreement, both parties being ignorant of the fire; *Held*, a valid and binding policy. *City of Davenport v. Peoria Marine & Fire Ins. Co.* 17 Iowa, 276. 1864.

§ 24. A party insured on his stock of goods, being about to remove them to another store, applied by his agent, to the insurers to procure from them an ordinary transfer of the policy on the goods, from the old to the new store. The secretary of the insurers told the agent, who described the property to him, to "let the policy remain as it was," and when it expired, "it (meaning the premium) will be less than now." The agent, who left the policy with him, promised to call for it later in the day, but failed to do so. Before the goods were removed from the original store, a loss by fire occurred; *Held*, that

there was no valid agreement varying or displacing that contained in the policy; and that the insurers were liable. *Kunzze v. American Exchange Fire Ins. Co.* 2 Robert. N. Y. 443. 1864.

§ 25. A condition in a policy of insurance that the instrument shall not be binding until actual payment of the premium, may be waived by a general agent of the company, by delivering the policy without exacting prepayment. *Wood v. Poughkeepsie Mut. Ins. Co.* 32 N. Y. 619. 1865.

See Payment of Premium, § 1. Place of Making Contract, 2.

CONTRIBUTION.

§ 1. Upon a double insurance, the insured is not entitled to two satisfactions; but, upon the first action, he may recover the whole sum insured, and may leave the defendant therein to recover a ratable satisfaction from the other insurer. *Newby v. Reed*, 1 W. Black. 416. 1760.

§ 2. Where several policies on same subject, each contain the *pro rata* clause of payment in case of loss, and one pay more than their share, they are not entitled to contribution from the others. But, if only one contains the clause, and others, without the clause, pay more than their share, they will be entitled to contribution from policy containing the clause. Hence that company, whose policy contains the clause, will have a defense *pro tanto* in an action upon it. If underwriters, sued on such policy, seek to defend on the ground that other policies without the clause have paid more than their ratable share, it lies upon them to prove affirmatively, that the other policies

did not contain this clause. It, being a matter of defense, will not be presumed. *Lucas v. Jefferson Ins. Co.* 6 Cowen, N. Y. 635. 1827.

§ 3. In this case the defendants insured \$2,000; the entire insurance on the property was \$8,000; the jury were instructed, if they found for plaintiff to assess the damages at one-fourth of the entire loss, provided the loss did not exceed the entire sum insured. *Harris v. Protection Ins. Co.* Wright, Ohio, 548. 1834.

§ 4. Where, in the declaration of assured, and in the policy given in evidence, it was stated that the property destroyed was covered by another policy, in another company, to the amount of six hundred dollars, and the jury rendered a verdict, without making any abatement for such other insurance; *Held*, that there must be a new trial, unless the assured would remit upon the record the excess of the damages. *Mechanics' Fire Ins. Co. v. Nichols*, 1 Harrison, N. J. 410. 1838.

§ 5. One policy was for \$1,000, on fixtures, and \$3,000 on stock; another for \$5,000 on stock and fixtures; both policies contained a clause providing that in case of any other insurance on the property, the company would only be liable to pay in proportion as the sum insured by them bore to the whole amount insured on the property. In an action upon the first policy; *Held*, that the first policy must be regarded as two separate policies of \$1,000, on fixtures, and \$3,000, on stock, and that the second insurance of \$5,000, on stock and fixtures as one parcel, was not a double insurance on the same subject, and that assured might recover, therefore, on the first policy, just as if the latter had never existed. *Howard Ins. Co. v. Scribner*, 5 Hill, N. Y. 298. 1843.

§ 6. A re-insurer is liable for the full amount of loss, within his contract, although a clause in his policy pro-

vides, "that in case there were other insurance prior or subsequent, the re-insured should be entitled to receive only a proportionate part," &c.; such clause refers to a case of other re-insurance. *Mutual Safety Ins. Co. v. Hone*, 2 Comst. N. Y. 235. 1849.

§ 7. Several policies of insurance were taken out on one building—additions were then added, and insurance taken on new and old. In an action upon policy covering the old; *Held*, that the amount of loss upon the new should be first deducted from policies covering both, before their aggregate amount is brought into calculation by which the proportionate liability of each is to be ascertained. *Cromie v. Kentucky & Lexington Mut. Ins. Co.* 15 B. Monr. Ky. 432. 1854.

§ 8. An insurance company may be compelled to pay the entire loss on a policy, within the amount insured, unless limited by its conditions; but will be entitled to sue for and recover proportionate amounts of other companies insuring against the same loss. *Peoria Marine & Fire Ins. Co. v. Lewis*, 18 Ill. 553. 1857.

§ 9. Policy in *Ætna* for \$4,000 on stock of drugs, medicines, &c., and policy of \$2,000, in *Dubuque Mutual* on same stock. One condition of *Ætna* policy provided, "That in case of any other insurance upon the property hereby insured, the assured shall not in case of loss or damage be entitled to demand or recover of this company any greater portion of the loss or damages sustained than the amount hereby insured shall bear to the whole amount insured on said property." *Held*, that the *Dubuque Mutual* policy, being void by reason of the subsequent insurance in the *Ætna* without notice to or consent of *Dubuque Mutual*, the *Ætna* was liable for the whole loss. *Hygum v. Ætna Ins. Co.* 11 Iowa, 21. 1860.

§ 10. A policy was taken for \$3,000, "additional to \$9,000, insured in other offices, and \$8,000 to be insured in other offices." At the time of the fire there was only \$11,000 additional. The policy contained the usual stipulation that, in case of loss, it would share the same in proportion to its share of the whole insurance. It was claimed that there was a contract or warranty that there should be \$17,000 of other insurance, at least so far as to furnish a basis of calculation of the amount recoverable; but the court held that such was not the true construction, and that the company must bear the loss in proportion to its share of the whole insurance actually effected. *Richmondville Union Seminary v. Hamilton Mut. Ins. Co.* 14 Gray, Mass. 459. 1860.

§ 11. Policy of insurance was for "\$2,000, being not more than three-fourths the value of the property insured on his stock in trade, being mostly chamber furniture in sets, and other articles usually kept by furniture dealers," and contained this statement: "other insurance of \$3,000 subsists, with liberty to have and make further insurance to an amount—." The policy was made subject to the conditions and limitations expressed in the by-laws, one of which prohibited a double insurance without consent of company, under penalty of forfeiture, and provided that, in case of loss or damage to property on which authorized double insurance did exist, "this company shall be liable to pay only such proportion thereof, as the sum insured by this company bears to the whole amount insured thereon, such amount not to exceed three-fourths of the actual value of the property at the time of the loss." In reply to the 17th question in application: "Is there any insurance upon the property on which application is made for insurance? If so, what amount, and where insured?" Answer was made, "\$1,500: \$1,500." The two policies thus referred to by assured, were insurances only upon his "stock of furniture," and the loss and damage was \$5,917, of which \$826 consisted of "paints, oil and varnish," which were not covered by these two policies.

The company's defence was that they were only liable to pay in proportion as the sum insured by them bore to the whole amount insured thereon, as stated in the face of the policy; and that the assured, by his recital of \$3,000, other insurance on the property was estopped from showing that in fact it was not all on the same property; but *Held*, that such recital in the policy of other insurance, in the absence of any fraudulent representation, did not affect the party insured, although some portion of the property insured should be found not to have been embraced in any other policy; and that assured might recover the whole amount of the loss on property covered by this policy alone, if such loss did not exceed three-fourths of its value at time of loss. *Haley v. Dorchester Mut. Ins. Co.* 1 Allen, Mass. 536. 1861.

§ 12. Where property covered by several policies of insurance is destroyed, the proportion of its value to be paid by one underwriter is that which the amount of his policy bears to the amount of all the insurance thereon, although some of the policies cover other property in addition to that destroyed. *Blake v. Exchange Mut. Ins. Co.* 12 Gray, Mass. 265. 1858.

§ 13. The right to contribution between insurers is based upon the concurrence of the policies, and it is a necessary incident of its existence, that the several insurers should be bound with equal certainty, and in the same sense for the same loss. *Baltimore Fire Ins. Co. v. Loney*, 20 Md. 20. 1862.

§ 14. A. and B. were insured against loss by fire by the defendant in the sum of \$5,000, on merchandise held by them for themselves, and on trust or on commission for account of whom it may concern. They were also insured by the St. Louis Insurance Company in the sum of \$4,000, on merchandise held in a similar manner, and also on merchandise held "in storage," which last was not covered by

policy of defendant. Merchandise of assured, to the amount of \$9,157 75, was destroyed by fire, of which sum \$7,470 75, was covered by policy of defendant, and \$1,687 was property held on storage, and not covered by policy of defendant, but included in that issued by the St. Louis Company. One condition of defendant's policy provided that: "in all cases of a plurality of insurances on the same subject, this company shall be liable for such ratable proportion of the loss or damage happening to the subject insured, as the amount insured by this company shall bear to the whole amount insured thereon." The Court of Common Pleas decided that the adjustment should be made by the following proportion: "as \$9,157 75 (the total value of the goods lost) is to \$4,000, (amount of policy covering the goods 'on storage,') so is \$7,470 75 (the value of general merchandise and goods on commission) to the value of general merchandise and goods on commission covered by said policy, that is, the sum of \$3,263 13, which sum is the proportion of the said policy, that covers general merchandise and goods on commission." Then adding this last sum thus ascertained to \$5,000, the amount of defendant's policy, and the total amount, \$8,263 13, will be the insurance to contribute to the loss on general merchandise and goods on commission. *Held*, that as between the insurers the mode adopted by the Court of Common Pleas was correct, if thereby the losses sustained by the assured were made good; but as in this case, the assured would not be fully indemnified, another plan must be adopted, to wit: the policy of the St. Louis Company should be first applied towards payment of the goods "in storage," and the amount thus paid deducted from the amount of said policy, leaving only the remainder to contribute with defendant's policy of \$5,000, on merchandise covered by both policies. *Angelrodt v. Delaware Ins. Co.* Supreme Court of Missouri; St. Louis County Legal Record & Advertiser, May 1862.

§ 15. Where there are several insurances on the same property, and the policies stipulate that each company shall be liable only for their ratable proportion of any loss, if one company pays more than its just share its remedy is not against the other companies for contribution, but against the assured. *Fitzsimmons v. City Fire Ins. Co.* 18 Wis. 234. 1864.

§ 16. In a case of double insurance, the policies are considered as one; and the insurers are liable *pro rata*, and are entitled to contribution to equalize payments made on account of losses. *Sloat v. Royal Ins. Co.* 49 Penn. St. 14. 1865.

§ 17. Four insurance companies insured machinery, &c. in buildings in a described enclosure, with the following condition annexed to their policies: "If at the happening of any fire the assured shall have insurance under a floating policy or policies not specific, but covering goods generally in various places, not designated, and yet within limits which include the premises or property herein insured, such policy as between the assured and this company shall be considered as covering any excess of sound value of the subject insured beyond the amount covered by the specific insurances thereon; and to determine the amount for which this company is liable in case of loss, such floating policy shall be considered an insurance on the property to the extent of such excess." Other insurance companies insured on specific property in the same enclosure. Upon a loss happening; *Held*, that the liability of the four insurance companies was not confined to the excess of loss above that covered by the specific insurances. They are liable to contribute ratably on the property insured in the specific policies which was covered by their general policies. *Merrick v. Germania Fire Ins. Co.* 54 Penn. St. 277. 1867.

See General Average, § 1. Other Insurance, 3, 25, 53, 92.

COUNTERSIGNING BY AGENT.

§ 1. Where it is stipulated in a policy of insurance "that it shall not be valid until countersigned by the agent," a policy signed by "B. for the agent," is void; and a premium note given by the insured is also void. *Lynn v. Burgoyne*, 13 B. Monroe, Ky. 400. 1850.

§ 2. The 19th clause of the 6th William IV., Ch. 18, provided "that any policy signed by the president and countersigned by the secretary, but not otherwise, shall be deemed valid and binding on the company." *Held*, that a policy issued without the president's name was invalid, and that the company could not be directly sued upon it; they could be compelled, however, upon the defect being noticed, to execute a valid policy of the proper date, and their by-law would estop them from objecting that the policy was not in fact executed before the loss. The assured having taken out a policy, thus unsigned, and paid a sum in cash, and also a portion of the premium note in cash, with a full knowledge of the defect, cannot recover back the premium so paid. *Perry v. Newcastle District Mut. Fire Ins. Co.* 8 Upper Canada, Q. B. 363. 1851.

COVENANTS TO INSURE.

§ 1. Injunction against an ejectment for breach of covenant to insure against fire, refused. *Reynolds v. Pitt*, 19 Ves. Jr. 134. 1812.

§ 2. The court will not relieve a tenant against breach of a covenant to insure. *Green v. Bridges*, 4 Simons, 96. 1830.

§ 3. A covenant to insure against fire, premises which are within the "building act," runs with the land. *Vernon v. Smith*, 5 Barn. & Adolph. 1. 1821.

§ 4. Certain premises were leased, with covenant in lease that the lessee should keep the premises insured, in the sum of £800, in some office in Westminster or London, and with a right of re-entry in case of forfeiture; and the lessee effected a policy on the premises, with an insurance company whose printed conditions declared, that the policy should be for such longer period as the tenant should regularly pay, and the company receive the premium, and a space of fifteen days beyond the quarter days was given for payment of the premium, during which time the company is liable; the year expired on the 25th March, 1811, but the tenant did not pay the premium for renewal till the 25th April following, when the company gave a receipt for the premium, stating the insurance to be from Lady Day, 1811, to Lady Day, 1812; *Held*, that from the 9th of April to the 25th, notwithstanding the company's receipt, there was no insurance on the premises, and the covenant to insure was broken; and the landlord was entitled to recover, under the clause of re-entry in the lease. *Doe d. Pitt v. Shewin*, 3 Camp. N. P. 134. 1811.

§ 5. Where a lessee covenanted to keep the premises insured, a neglect so to do for fourteen days is a breach of such covenant, and where lessee had sub-let, and the sub-lessee effected an insurance in his own name; *Held*, that lessor could not avail himself of the insurance effected by the sub-lessee, under condition in covenant that such insurance money should be applied to the rebuilding or repairing the premises, by the sub-tenant, under the lessee's direction—as there was no privity between lessor and sub-tenant. *Keteltas v. Coleman*, 2 E. D. Smith, N. Y. 408. 1854. Note says this case was affirmed in the court of appeals.

§ 6. Covenant by lessee to insure the premises in the name of the lessor, the insurance money to be expended

in the erection of new buildings; *Held*, a covenant running with the land, and that an action would lie on it against the assignee of the lessee.

Held, also, that the measure of damages was the value of the premises lost to the plaintiff by the defendant's neglect to insure, such value not exceeding the sum in which the defendant was to have insured by his covenant; and that it could make no difference that on failure of the lessee to insure, the lessor was allowed by the lease to do so, and charge the premiums as rent. *Douglass v. Murphy*, 16 Upper Canada, Q. B. 113. 1858.

§ 7. A covenant between lessor and lessee to insure, when the money realized in case of loss is to be expended in re-building or repairs, is such a covenant as may run with the land; and if assignee of lessee fails to pay premiums for insurance as stipulated in covenant, assignee of lessor may pay same, and recover them from assignee of lessee. *Masury v. Southworth*, 9 Ohio St. 340. 1859.

§ 8. At common law, a promise for a valuable consideration to make a policy of insurance is valid, although not in writing. *Post v. Aetna Ins. Co.* 43 Barb. N. Y. 351. 1864.

§ 9. Where A. agreed to pay B. \$47.50 as premium for an insurance within one month, and B. agreed to deliver within a month an insurance policy to A.; *Held*, that the consideration of the stipulation on either side was the promise made by the other; that either could perform at any time during the month, and that B. was not bound to deliver the policy until the end of the month. That no demand was necessary, and B. was as much bound to deliver the policy as A. was to pay the premium. *Western Massachusetts Ins. Co. v. Duffey*, 2 Kansas, 347. 1864.

§ 10. The defendant had given a bill of sale of personal property as security for a debt, and the deed con-

tained a covenant to insure, but no provision for the application of the insurance money in case of loss. The property was destroyed and the defendant became bankrupt. *Held*, that the assignee of the property had no lien upon the insurance money. *Lees v. Whitely*, Law Rep. 2 Eq. 143. 1866.

For cases of Covenants to Insure, see also, *Doe d. Darlington v. Ulph*, 13 Jurist, 276; 18 L. J. Q. B. 106. *Penniall v. Harborne*, 11 Q. B. 368; 12 Jurist, 159; 17 L. J. Q. B. 94. *Hey v. Wyche*, 2 Gale & D. 569; 12 Law J. N. S. 83; 6 Jurist, 559. *Logan v. Hall*, 4 C. B. 598. *Doe d. Muston v. Gladwin*, 6 Q. B. 953; *Doe d. Bridger v. Whitehead*, 8 Ad. & E. 571; 3 Nev. & P. 557; *Doe d. Pittman v. Sutton*, 9 Car. & P. 706; *Doe d. Knight v. Rowe*, 2 Car. & P. 246; R. & M. 343. *Camden v. Morton*, 2 Eden, 219; Amb. 619.

See Assignment, § 36. Mortgage and Mortgagee, 6.

DAMAGES.

§ 1. The building insured stood upon leased ground, with a condition of renewal in the lease or of removal of the building. Fifteen days before the expiration of the lease, the building was destroyed by fire, the lease not having then been renewed. The evidence showed that the building was worth \$1,000, as it stood, but if it were necessary to remove it, would not be worth over \$200. The insurance was for \$800. The policy agreed to pay the true and actual value of the property at the time the fire should happen. *Held*, 1st, that the policy was not a valued policy, and that assured could not recover any greater satisfaction for the loss than the actual value of the building destroyed; 2d, that such loss and damage was to be determined, without any reference to extraneous circumstances, whereby the value of the building might be increased or diminished, and that the intrinsic value of

the building, therefore, as it stood at time of the fire, was the true criterion for determining the value of the same, and for such amount, not exceeding the sum insured, the assured might recover. *Laurent v. Chatham Fire Ins. Co.* 1 Hall, N. Y. 41. 1828.

§ 2. Where the policy agreed to make good to the assured all such loss or damage as shall happen by fire to the property described, not exceeding the sum insured; *Held*, that the insurers were liable for the entire loss, not exceeding amount insured, although the value of the goods was greater than the sum insured. *Peddie v. Quebec Fire Ins. Co.* 1 Stuart, Lower Canada, 174. 1824.

§ 3. A mortgagor, whose equity of redemption has been seized on execution, may recover the entire value of the building, not exceeding the sum insured. *Strong v. Manufacturers' Ins. Co.* 10 Pick. Mass. 40. 1830.

§ 4. When machinery is insured for a certain sum and is destroyed by fire, it is the actual value of the property destroyed, and not the sum in the policy, which the insured is entitled to recover; and the intrinsic marketable worth is the only rule for estimating the value. *Hercules Ins. Co. v. Hunter*, 14 Cases in the Court of Sessions, 1137. 1836.

§ 5. The plaintiff acquired by deed of quit-claim the equity of redemption of certain premises on which the mortgagee had entered for condition broken and insured for \$1,500, stated by the policy to be not more than three-fourths the value of the property—the land being estimated to be worth \$1,000, the buildings \$2,050, and the mortgage amounting to \$1,650, and the insurance being taken with full knowledge of the premises and mortgage. *Held*, that though three-fourths of the value of the premises, deducting the mortgage, was much less than that, the plaintiff was entitled to recover the whole amount de-

stroyed by fire. *Borden v. Hingham Mut. Ins. Co.* 18 Pick. Mass. 523. 1836.

§ 6. In this case the preliminary proofs as to amount of loss were confessedly loose and indefinite, the books of account and other data for forming an estimate having been destroyed by fire; the court, therefore, refused to permit any interest to be calculated against the company on the amount of loss as found by the verdict of the jury. *McLaughlin v. Washington County Mut. Ins. Co.* 23 Wend. N. Y. 525. 1840.

§ 7. An insurance to a mortgagee is an insurance of his debt, and insurer is only liable to the amount of that debt; but if policy, taken out by mortgagor, has been assigned as collateral security to the mortgagee, the entire loss may be recovered. *Carpenter v. Washington Ins. Co.* 16 Pet. U. S. 495. 1842.

§ 8. The contract of insurance is essentially one of indemnity, and this indemnity must be adjusted on the principle of replacing the insured, as near as may be, in the situation he was in at the commencement of the risk. The amount of the insurable interest is the market value of the articles at the time and place of the commencement of the risk, and when they have been purchased near that time and place, the cost to the assured is the most satisfactory though not the only criterion of their value. *Marchesseau v. Merchants' Ins. Co.* 1 Rob. La. 438. 1842.

§ 9. Insurance company cannot be made to pay interest after the sixty days stipulated for in the policy, if it has been prevented from so doing by trustee process. *Oriental Bank v. Tremont Ins. Co.* 4 Met. Mass. 1. 1842.

§ 10. Where defendants, sued on a policy of fire insurance underwritten by them, are shown to have con-

sented that the property damaged by the fire should be sold at auction, the price at which it was sold is a proper criterion by which to estimate the damage of the insured. *Henderson v. Western Marine & Fire Ins. Co.* 10 Rob. La. 164. 1845.

§ 11. Where a mutual company has insured to an amount not exceeding two-thirds or three-fourths of the value of the property, the contract being one of indemnity, the assured is entitled to recover the amount of that loss, if less than the sum insured; and if there is a total destruction of the property, then to the amount of the policy. *Liscom v. Boston Mut. Ins. Co.* 9 Met. Mass. 205. 1845.

§ 12. When goods insured against fire are destroyed, the insurer is bound to pay their value at the time of the loss; if damaged only, he is bound for the difference between their value in their sound and damaged condition. When the goods are so much damaged as not to be saleable in the ordinary mode, a fair sale at auction made by the assured, after reasonable notice to the insurers, or with their knowledge, may be considered by a jury in estimating the damage and in ascertaining the amount of the indemnity; but the price for which such damaged goods were sold at auction by the assured, without notice to or knowledge by the insurers of the sale, is not sufficient evidence of the value of the goods in their damaged condition. *Hoffman v. Western Marine & Fire Ins. Co.* 1 La. An. 216. 1846.

§ 13. When a building insured is totally destroyed by fire, the cost of rebuilding does not furnish the true rule of damages. Under such a rule, the amount recovered would be more than a fair indemnity. There is no rule of damages applicable to such cases; and where no rule of damages is established by law, the jury are to decide the question, and to their decision there can be no legal exception. *Brinley v. National Ins. Co.* 11 Met. Mass. 195. 1846.

§ 14. Insurance was upon cotton-mill and machinery. *Held*, that insured was entitled to recover only the actual damage, which damage on the machinery might be ascertained by estimating the cost of fitting up "new" machinery in the mill of a description similar to that which had been destroyed, and deducting from amount of such cost, the difference in value between the machinery in the mill as it was immediately before it was destroyed, and the "new" machinery of a similar description when fitted up. *Vance v. Forster*, 2 Crawford & Dix's Ct. Rep. Irish, 118. 1841. Also noted in 3 Stephens' Nisi Prius, 2084.

§ 15. Where building was leased and destroyed by fire, after lessee had insured it; *Held*, that he could only recover for the value of the tenements for occupation, subject to rent, and that to determine that value, the question should be put to the jury in this shape: "How much would a stranger, having no engagements or contracts pending, have given for the unexpired lease when the fire occurred?" *Niblo v. North American Ins. Co.*, 1 Sandf. N. Y. 551. 1848.

§ 16. In fire policies, the insurance covers the entire loss of property by fire, if within the limit of the insurance, and no deduction is to be made, because the entire value of the subject insured was much greater than the whole sum insured by the policy. *Underhill v. Agawame Mut. Ins. Co.* 6 Cush. Mass. 440. 1850.

§ 17. Where the insurance company promised to pay all losses within three months and without deduction, they cannot retain two per cent. a month of premium note for balance of the term of policy; and no custom permitted to be shown to explain away these plain requirements of the policy. *Swamscot Machine Co. v. Partridge*, 5 Fost. N. H. 369. 1852.

§ 18. In this case the insurance was for \$2,500. The loss occurred in October, 1846. The company were sum-

moned as trustees the following December. The directors voted to allow \$2,000 as the amount of the loss, in August, 1847. The jury having found that the loss exceeded the amount of insurance, the court discuss the question of interest, and lays down the following rules: Unless the contract of insurance, expressly or by implication, prescribes another rule, interest should be computed on the actual loss, from the time when it happened. By the charter in this case, the company were not bound to pay until three months after they received notice of the loss; and under it, if they settle and are ready to pay a loss within the three months, no interest can be allowed. In this case, as the company only voted to allow \$2,000, when, according to the verdict, the whole amount of the policy, \$2,500, was due, interest must be computed on the balance, \$500, from the time of the loss. The damages on a policy, until they are ascertained, by agreement or otherwise, are unliquidated; and therefore the trustee process did not attach to the \$500; nor to the \$2,000, until the allowance of that sum was voted; and as the directors made an unreasonable delay, after the expiration of the three months, in voting that allowance, interest is to be charged on the \$2,000, from the expiration of the three months to the date of the vote of allowance. And, further, as final judgment, under the trustee process, was rendered for a less sum than \$2,000, interest is to be charged on the balance, after deducting the amount of that judgment and costs, from the date of the judgment. *Nevins v. Rockingham Fire Ins. Co.* 5 Fost. N. H. 22. 1852.

§ 19. Where policy insured against "all loss or damage by fire," said loss and damage to be estimated according to the true and actual cash value of the said property at the time the same shall happen; *Held*, that the assured might recover the full and actual value of imported goods then in custom-house, although the duties had not been paid or secured. *Wolf v. Howard Ins. Co.* 1 Sandf. N. Y. 124, 1847; affirmed 3 Seld. N. Y. 583. 1853.

§ 20. If, after effecting insurance on a mortgagee interest, the insured parts with any of his securities, or part of his claim is paid, the insurer will only be liable on his insurance to the amount remaining. But if the insured parts with a portion of his securities, or receives part of his claim, after the suit is commenced, it does not affect the case. The equitable claims between the parties cannot be left to the jury on the trial; their rights must be determined as they stood when the suit was commenced, and, if the insurer has any remedy, he must resort to a court of equity. *Sussex County Mut. Ins. Co. v. Woodruff*, 2 Dutch. N. J. 541. 1856.

§ 21. Under an ordinary fire policy, agreeing to make good all loss or damage to the property insured, not exceeding the sum insured, where the assured had at risk \$18,000 at time of fire, his loss being but \$6,000, and his insurance \$5,000; *Held*, that he could recover the whole amount of \$5,000. and not the proportion only of \$5,000 to \$18,000, as in Marine insurance. *Mississippi Mut. Ins. Co. v. Ingram*, 34 Miss. 215. 1857.

§ 22. The report of a committee of a mutual insurance company, appointed by the president, in accordance with the provisions of the act of incorporation, "to examine and inquire into a loss, and, after ascertaining the sum to which the assured is entitled, to make provision and payment thereof," is not conclusive of the amount of the loss, in an action by the insured against the company on the policy of insurance. *Insurance Co. v. Rupp*, 29 Penn. St. 526. 1858.

§ 23. Where a policy of insurance on a steamboat, against fire, provided that in the event of loss the damage should be estimated "according to the true and actual cash value of the said property at the time the same shall happen;" *Held*, that in estimating loss the defendants were not entitled to have taken into account a depression in the value of steamers generally, caused by circum-

stances which might be temporary only. *McCraig v. Quaker City Ins. Co.* 18 Upper Canada, Q. B. 130. 1859.

§ 24. In a policy of \$3,000 on reaping machines, it was stipulated that "the company would make good to assured all loss or damage to the property by fire, the said loss or damage to be estimated according to the true and actual cash value of the said property at the time the same shall happen." There was evidence offered to show that the machines, on account of defective principle, were only valuable as so much wood and iron; but the judge instructed the jury that the cost of construction, and before it was tried in the field, would be the measure of damages. *Held*, that such instruction was erroneous, and the measure of damages was that agreed upon in the policy, to wit: "the actual cash value at the time of the loss and damage." Also, that the option to replace the machinery, if destroyed, was a reservation for the benefit of the company; they were not bound to adopt it. What it would cost, therefore, to replace the reaping machines, did not furnish the rule for the damages which the company must pay to make good the loss.

Nor was the fact that the machines insured were constructed under a patent, of any importance. Patented or unpatented, what they were worth at the happening of the fire, was, by agreement of the parties, to be the measure of their value; and this must be ascertained by testimony, as is done in every other case, where the value is not fixed. *Commonwealth Ins. Co. v. Sennet*, 37 Penn. St. 205. 1860.

§ 25. Where a policy of insurance against fire, on a steamboat, provided that the "loss or damage shall be estimated according to the true and actual cash value of the property at the time the loss shall happen," and the defendants introduced evidence of the market price and value of other steamboats, similar or nearly so to the one insured, and at or about the time of the accident, as the

policy criterion of the value of the boat insured, which evidence the court refused to admit, and afterwards instructed the jury "that the value was to be the fair value, at time of the loss, unaffected by local circumstances or by other accidental causes of depreciation;" *Held*, that the court erred, both in its refusal to admit the evidence, and in its instruction to the jury; that the value of the subject insured was to be determined in conformity to the stipulation in the policy, and that the defendant's criterion of value was the proper one. *Grant v. Ætna Ins. Co.* Queen's Bench, Appeal side, Montreal, Lower Canada. 1860.

§ 26. Under a policy on a building which provides that the insurers may "make good the damage by repairs, and the insured shall contribute one-fourth of the expense," if the insurers, intending to comply with this provision in good faith make repairs of substantial benefit, though not fully making good the loss, the measure of the assured's damages is the difference between the value of the building as repaired, and what it would have been if fully repaired, deducting one-fourth of their value to the estate. *Parker v. Eagle Fire Ins. Co.* 9 Gray, Mass. 152. 1857.

§ 27. A policy of insurance contained the following condition: "Where property insured in this company is damaged by removal from a building in which it is exposed to fire, said damage shall be borne by the insured and insurers in such proportions as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant." A portion of the property insured, was wholly destroyed by fire, and another portion damaged by removal. In an action to recover all the damage sustained; *Held*, that the condition meant that the damage occasioned by the removal of the property, should be borne by the parties according to their respective interests or risks, the share of either bearing the same proportions to the whole dam-

age that his interest in the property or risk bore to the whole value, and that the insured could recover only such proportion of the loss by removal as the insurance bore to the whole property at risk at the time of the fire. *Peoria Marine & Fire Ins. Co. v. Wilson*, 5 Minn. 53. 1860.

§ 28. Upon a loss after a release of his interest by one member of a firm, the other partners to whom the release was given can recover, in their own names, the whole loss under the policy, including not only the interest released, but also any loss of goods bought by them after the release, coming within the description in the policy. *Hoffman v. Ætna Fire Ins. Co.* 1 Robert. N. Y. 501. 1863. S. C. 19 Abb. Pr. 325. Affirmed, 32 N. Y. 405.

§ 29. If goods were those which insured dealt in at wholesale, or manufactured, the price for which similar goods were generally sold by wholesale dealers or manufacturers may be considered by the jury in estimating their value, in an action upon a policy to recover for their loss. *Hoffman v. Ætna Ins. Co.* 1 Robert. N. Y. 501. 1863. S. C. 19 Abb. Pr. 325. Affirmed, 32 N. Y. 405.

§ 30. Where there is a provision in a contract of insurance that, instead of paying the damages in money in case of loss, the insurers may elect to rebuild on giving the notice stipulated in such contract, and a loss occurs and the insurers elect to rebuild and give the stipulated notice to the insured; the contract is thereby converted into a building contract; and the amount of the insurance named in the policy ceases to be a measure of damages. *Morrell v. Irving Fire Ins. Co.* 33 N. Y. 429. 1865.

§ 31. Where insurers elected to rebuild and partially performed the contract, but desisted therefrom before fully completing it, the rule of damage, in an action brought by the insured for the non-performance of the

building contract, is the amount it would take to complete the building by making it substantially like the one destroyed, independent of what had already been expended thereon. *Morrell v. Irving Fire Ins. Co.* 33 N. Y. 429. 1865.

§ 32. If a partial loss occurs upon a domestic policy, for a sum expressed in dollars, upon property situated in a foreign country, the rule for estimating damages is to determine the loss at the place where it occurred, in the currency of that country, and then to find the equivalent in the country where suit is brought, by determining the actual intrinsic value of the currency of that country, as compared with the currency of the other. And that the policy contains a provision that in case of loss the company shall have the right to replace the articles lost or damaged with others of the same kind and equal goodness, does not affect this rule. *Burgess v. Alliance Ins. Co.* 10 Allen, Mass. 221. 1865.

See Consequential Damages, and Damages Beyond Actual Loss. Also, Agent, § 5. Alienation, 2, 33, 51. Assessments, 5. Description of Property Insured, 19. Evidence, 6, 12, 16, 24. Floating Policy, 1, 2. Insurable Interest, 6, 9, 11, 13, 28. Other Insurance, 100. Parol Contract, 7. Premium Notes, 24. Re-insurance, 4, 5. Risk, 7. Successive Losses, 1, 3, 4. Two-thirds or Three-fourths Clause, 3, 6, 7, 8, 9, 10. Who may Sue, 7. Written Portion of Policy, 2.

DAMAGES BEYOND ACTUAL LOSS.

§ 1. U. contracted to sell a house and lot to W., and afterwards took policy on house in his own name, and received part of purchase money before insurance, and more before loss. *Held*, 1st, that the policy *prima facie* covered the entire legal and equitable interest, and not merely U.'s security for the balance of purchase money due; U. being

entitled to recover for the whole loss, holding the surplus, after paying himself, as trustee for W. If a more limited interest was intended to be covered by the policy, the burden of showing this was on the company; 2d, that as the insurance was on the house, not expressed to be to cover a debt, and not including the lot, the company was not entitled to any cession of the lot, or of the claim against W.; and, as the house was totally destroyed, there was nothing of that to cede. *Insurance Co. v. Updegraff*, 21 Penn. St. 513. 1853.

§ 2. Where a mortgagee had mortgagor's policy assigned to him with consent of the company, and had given another note for payment of assessments, and thereby, under by-laws of the company, stood in the same position as if holding policy of company on his interest as mortgagee, and a fire occurred, damaging mortgaged property to the amount of \$574, which was repaired and made good as before, by the owner of the equity of redemption before the commencement of this suit; *Held*, nevertheless, that the contingency contemplated by the contract had arisen, and the company were bound to pay the amount of the damage. *Foster v. Equitable Mut. Fire Ins. Co.* 2 Gray, Mass. 216. 1854.

§ 3. A policy insuring "all the articles making up the stock of a pork house, and all within the building and pertinent thereto," covers everything properly belonging to the stock of a pork house, without regard to the particular ownership of each and every article contained in or appurtenant to the building, and although clause in policy requires "goods on commission to be insured as such." *Ætna Ins. Co. v. Jackson*, 16 B. Monroe, Ky. 250. 1855.

§ 4. In a suit brought by mortgagee, on a policy of insurance against fire, it is not competent for the insurance company, in order to defeat or diminish the recovery of assured, to show that the mortgaged premises, notwithstanding

ing the loss, are still ample security for the debt. *Kernochan v. New York Bowery Fire Ins. Co.* 5 Duer, N. Y. 1. 1855. Affirmed, 17 N. Y. 428. 1858.

§ 5. When a policy of insurance is held by a mortgagee, whose mortgage was given partly for the price of the land, and partly to secure payment of advances to be made for the building; *Held*, that after a loss by fire, the mortgagee might recover the whole insurance, and was not obliged to look to the land for its value, although the land was sufficient to satisfy the balance of the mortgage due; but upon payment of the loss, the insurers would be entitled to subrogation, and could enforce the security against the land. *Rex v. Insurance Co.* 2 Philadelphia Rep. Pa. 357. 1858.

§ 6. M. sold to L. a lot of land in consideration of a constituted rent of £60, payable annually on a capital of £1,000, the purchaser, by the deed, binding himself to erect buildings on the lot, and insure the premises to the extent of £400, as collateral security. M. afterwards sold the debt to the plaintiff, who insured the buildings, so erected by L., to the extent of £400, being declared in the policy "to cover a *constitut* held by the assured on the property described, as security for the payment of the land." Whilst this policy was in force, the buildings were destroyed by fire, but were rebuilt and restored to their original condition and value by the purchaser, L., before the action was brought by plaintiff. In an action by plaintiff, on the policy issued to him; *Held*, that the contract of insurance was a contract of indemnity, and as the buildings had been restored, and the security of plaintiff thereby made as valuable as before the fire, and this had been done before the commencement of this suit, the plaintiff had sustained no loss or damage, and could not therefore recover. *Matthewson v. Western Assurance Co.* 10 Lower Canada, S. C. Montreal, 8. 1859.

§ 7. A policy of insurance upon goods will not be discharged by an executory contract for the sale of such goods, or by the receipt of a portion of the purchase money therefor, if at the time of the loss the title to the goods remains in the person insured; and his right to recover is not limited to the balance of purchase-money remaining due. *Boston & Salem Ice Co. v. Royal Ins. Co.* 12 Allen, Mass. 381. 1866.

See Alienation, § 23, 33. Goods in Trust or on Commission, 2, 8, 10. Insurable Interest, 24. Responsibility of Assignee for acts of Assignor, 8. Written Portion of Policy, 2.

DEPENDENCY OF POLICY AND PREMIUM NOTE.

§ 1. Where a policy in a mutual company is obtained upon the suppression of a fact in the application which was material to the risk, a subsequent reception of an instalment on the premium note does not render the policy binding, in a case where neither the company nor the agent had notice of the existence of the fact suppressed. *Allen v. Vermont Mut. Fire Ins. Co.* 12 Vt. 366. 1840.

§ 2. After an assignment of the policy, which was relied on as having avoided the contract, an assessment was made on premium note, signed by plaintiffs, for losses occurring before the assignment. *Held*, that the collection of these assessments did not revive the policy. *Smith v. Saratoga Ins. Co.* 3 Hill, N. Y. 508. 1842.

§ 3. Where policy provided, that upon alienation of the property insured, the assured might surrender his policy and take up his premium note, upon payment of all losses then due, &c., and the insured alienated the

property, but did not surrender the policy or take up his note, and the company had full knowledge that the policy had become void by alienation of the property, and afterwards collected assessments on account of losses after such alienation; *Held*, that this did not revive the policy, nor operate as a waiver of the right of the company to treat it as void. *Neely v. Onondaga County Mut. Ins. Co.* 7 Hill, N. Y. 49. 1844.

§ 4. If an insurance company, with a knowledge of breach of warranty in application as regards distance of other buildings, which avoids the policy *ab initio*, make and receive assessments from insured on his premium note, after the fire, and with knowledge of the breach, they will be estopped from setting up the breach of warranty in defense to an action on the policy. *Frost v. Saratoga Co. Mut. Ins. Co.* 5 Denio, N. Y. 154. 1848.

§ 5. Where policy has been rendered void by a transfer of interest, the insured continues personally liable on his premium note, until an actual surrender of the policy to the insurance company. *Indiana Mut. Fire Ins. Co. v. Coquillard*, 2 Carter, Ind. 645. 1851.

§ 6. After forfeiture of policy, by alienation of the property insured, a member is not liable for assessments on his premium note for losses occurring after such alienation. *Wilson v. Trumbull Mut. Fire Ins. Co.* 19 Penn. St. 372. 1852.

§ 7. The insured is liable for assessments on his premium note during the whole term of insurance, even though the property had been consumed and full amount of policy paid, unless there is something in the charter or by-laws, or premium note, showing a different contract or discharge. *New Hampshire Mut. Fire Ins. Co. v. Rand*, 4 Fost. N. H. 428. 1852. *Swamscot Machine Co. v. Partridge*, 5 Fost. N. H. 369. 1852.

§ 8. Where policy was avoided by alienation before the fire, and the insurers levied and collected an assessment made after the fire; *Held*, not a waiver of the forfeiture. *Boynton v. Clinton & Essex Mut. Ins. Co.* 16 Barb. N. Y. 254. 1853.

§ 9. Insurance upon machinery in mill, with condition "that if the mill were operated the policy should be void." The mill burned up on the 26th of April, and on the 1st of April the company levied an assessment of \$26, and collected it on the 4th of July following. It was proven, on trial, that the condition had been violated by assured by putting the mill in operation after the insurance was effected, and the company relied upon it as a matter of defense. *Held*, that when policy became void by breach of condition, the note also became void; and that the company by collecting an assessment on it, with a knowledge of the facts, had waived the forfeiture, and admitted the contract of insurance as still in existence. *Viall v. Genessee Mut. Ins. Co.* 19 Barb. N. Y. 440. 1854.

§ 10. The plaintiff, after loss, notified the company of the existence of another policy on the property, not before known to them, the existence of which without consent of the company rendered their policy void, upon which the company rejected his claim. Afterwards the company made and collected an assessment on plaintiff's premium note. *Held*, that such assessment did not waive the forfeiture, and render the company liable to pay the loss. *Philbrook v. New England Mut. Fire Ins. Co.* 37 Me. 137. 1853.

§ 11. The receipt of assessments, after the insured property was destroyed by fire, for losses occurring during continuance of the policy, such losses also occurring after the policy had been forfeited by act of the insured, is no waiver of the forfeiture. *Gardiner v. Piscataquis Mut. Ins. Co.* 38 Me. 439. 1854.

§ 12. In this case, *Held*, that with the sale of the property all liability on the premium note ceased and company could not recover on it. The policy and premium note are dependent contracts. *Indiana Mut. Fire Ins. Co. v. Conner*, 5 Port. Ind. 170. 1854. Overruling 2 Carter, Ind. 645.

§ 13. If insurance company continue to treat policy as valid, by not declaring it void, and continuing to levy and collect assessments on the premium note, even after the loss, after notice of an insurance beyond the amount allowed within policy, it is a waiver of their right to resist a recovery on that ground. A condition, however, that the loss shall be apportioned between this and other offices insuring on same property, *pro rata*, is not thereby waived. *Insurance Co. v. Stockbower*, 26 Penn. St. 199. 1856.

§ 14. Where an administrator, after death of assured, paid assessments on the premium note for losses occurring subsequently to the death of the assured, it was *Held*, that by the levying and collection of such assessments the company were estopped from denying the validity of the insurance after that event, and that the administrator should be allowed whatever he paid as assessments for losses happening after the death of the intestate, for two reasons: 1st, on the ground that it was his duty to preserve the property while in his care; and 2d, because the lien upon property insured, given by the charter of the company in which intestate had been insured, "such lien to continue during the existence of the policy and the liability of the assured therein, notwithstanding any transfer or alienation," was a valid lien and an encumbrance which it was the duty of the administrator to remove. *Tuttle v. Robinson*, 33 N. H. 104. 1856.

§ 15. The charter provided that all persons who should insure with the corporation, should thereby become members thereof during the period they should remain so in-

sured, and no longer. *Held*, that under this charter, a party insuring continued a member of the corporation, and liable to assessments on his premium note, during the term of the policy; and that this membership and liability did not terminate when a loss occurred and the policy was paid up. *Bangs v. Scidmore*, 24 Barb. N. Y. 29. 1857. Affirmed 21 N. Y. 136—see *post*, § 19.

§ 16. Where policy had become void by sale of one partner to the other, and the company, in ignorance of that fact, afterwards collected assessments on the premium note of the remaining partner, and at time of loss chose appraisers to determine the value of the property lost; *Held*, that the company had not thereby waived forfeiture of the policy. *Finley v. Lycoming County Mut. Ins. Co.*, 30 Penn. St. 311. 1858.

§ 17. Where charter provided that in case of alienation of the property insured, the assured should surrender his policy, take up his premium note, &c.; *Held*, that an alienation of the property insured, without notice to the company, or surrender of policy, would not release assured from liability for assessments, upon his premium notes, for losses occurring subsequent to the alienation; but where a by-law provided, "that when an insured has aliened his property insured, before any loss has been sustained, his premium note shall not be assessed, although he has not surrendered his policy;" *Held*, that his liability upon his premium note for assessments, for losses occurring subsequent to the alienation, ceased; that by this by-law the company waived a compliance, by any or all of its members, with the provisions of the charter relating to a surrender of the policy, &c. *Huntly v. Beecher*, 30 Barb. N. Y. 580. 1859.

§ 18. The condition in an insurance policy issued to C. & Co. was as follows: "Any member of this company who shall have been assessed for the payment of any loss or

damage by fire, neglecting or refusing to pay such assessment for thirty days after he or she shall have had notice of the same, shall forfeit his or her policy, provided the premium note or notes deposited with the company, after paying any losses or expenses which may have accrued thereon, shall be given up to him or her on demand;" the policy was assigned January 13, 1855, the transfer approved by the company March 5, 1855, and the premium note of C. & Co. given up, and a new note taken from the assignees. An assessment had been made on the note of C. & Co. October 3d, 1854, notice of which assessment was given to them, and to the plaintiffs May 17, 1855; the assessment was not paid; in an action on the policy, brought by the assignees to recover for a loss by fire; *Held*, that it was only a "member" of the company, who shall have been assessed for the payment of any loss, that could incur the forfeiture by non-payment of the assessment; that at time of this assessment plaintiffs were not members of the company; the assessment was not made against them or upon their note; that the fire had occurred and the assessment been made before they became members; and that the validity of the policy, therefore, was not affected by the non-payment of the assessment against C. & Co., they not being members of the company when notice of the assessment was given to them. *Brannin v. Mercer County Mut. Fire Ins. Co.*, 4 Dutch. N. J. 92. 1859.

§ 19. The case of *Bangs v. Scidmore* cited, *ante*, § 15; affirmed 21 N. Y. 136. 1860.

§ 20. The policy contained a clause, that if the premises should be appropriated to uses hazardous or extra hazardous, then it should cease to be of effect "so long as the same shall be so used." The premises were put to uses which forfeited the policy, but it was claimed that the company had waived the forfeiture by the collection of assessments. *Held*, that if the company, with full knowledge of the forfeiture, collected assessments for

losses occurring after the forfeiture, they ought not in good conscience and honest dealing to be permitted to gainsay the admission implied by the act. At least a jury would be justified in concluding, from such assessments and collection, that the forfeiture had been waived. *Keenan v. Missouri State Mut. Ins. Co.*, and *Ryder v. Same*. Supreme Court of Iowa, June Term. 1861.

§ 21. After a company has chosen to assert the validity of a policy issued by it, by bringing an action upon the premium note to recover an assessment, the insured cannot be permitted to set up the falsity of his own statements in the application to avoid the policy, and show a want of consideration for the note. *Huntley v. Perry*, 38 Barb. N. Y. 569. 1860.

§ 22. An action to recover assessments upon a premium note given a mutual insurance company, cannot be maintained if it appears that the policy which was issued was invalid. *Haverhill Ins. Co. v. Prescott*, 42 N. H. 547. 1861.

§ 23. An action upon a note given for the premium on a policy of insurance, will not be defeated by proof of an unexecuted parol agreement to cancel the policy and surrender the note upon payment of a proportional part of the amount of the latter. *Columbia Ins. Co. v. Stone*, 3 Allen, Mass. 385. 1862.

§ 24. A mutual insurance company has no right to assess a premium note for losses occurring after the cancellation of the policy, or for anticipated losses arising from a supposed failure of others to contribute their proportion of losses occurring after such cancellation. *York County Mut. Fire Ins. Co. v. Turner*, 53 Me. 225. 1865.

§ 25. Where an insurance company, being sued by the insured, to recover for a loss, defended the action upon the

ground that the insured had procured other insurance upon the same property, without giving notice of the same, or having it endorsed upon the policy issued by such company; and the defense was sustained and the defendant recovered a judgment; *Held*, that such judgment was in legal effect an express adjudication between the parties that the policy of insurance sued on was void and of no force after the day on which the additional insurance was procured, and was expressly avoided by the election of the company, as from that date; and that the moment the policy became thus void by the election of the company to avoid it, the note given by the insured, for the premium, also became void for want of consideration, in respect to all future risks and losses of the company, and that an assessment to cover losses happening after such date could not be recovered. *Tuckerman v. Bigler*, 46 Barb. N. Y. 375. 1866.

See Assessments, § 35. Other Insurance, 78. Premium Notes, 3, 5, 7, 9, 10, 22, 25. Revival and Suspension of Policy, 2, 5.

DESCRIPTION OF PROPERTY INSURED.

§ 1. Goods insured were described in the policy to be in dwelling house of insured; the insured had only one room, as a lodger, in which the goods were; *Held*, correctly described within the condition that "the houses, buildings, or other places where goods are deposited and kept, shall be truly and accurately described," such condition relating to the construction of the house and not to the interest of the parties in it. *Friedlander v. London Assurance Co.*, 1 M. & Rob. 171. 1832.

§ 2. Policy on certain property in cotton mill. "Warranted that the above mill is conformable to the first class of cotton and woolen rates delivered herewith." The mill

in fact was second class. *Held*, that the warranty was broken, and it made no difference whether the variance was material or otherwise; there could be no recovery. *Newcastle Fire Ins. Co. v. MacMoran*, 3 Dow, 255. 1815.

§ 3. In the policy of insurance it was stated "that the dwelling-house of assured was built of stone and covered with tin, gables through the roof and plafond, iron doors and shutters." The fire, destroying the building, began in an adjoining house, and spread from thence to a wooden building on the premises of assured, from which it was communicated through a doorway of the dwelling-house, which was open, although it had an iron door, to the interior of the last-mentioned edifice; *Held*, that the description "iron shutters and doors," whether regarded as representation or warranty, was substantially true, and did not include by implication the duty of keeping them closed; *Held*, further, that the fact of their being open in the middle of August, at 8½ P. M., was no proof of negligence. *Scott v. Quebec Fire Ins. Co.*, 1 Stuart, Lower Canada, 147. 1821.

§ 4. Policy on a building described as a barn, which was an agricultural building, not strictly to be described as a barn, but would have been insured at the same rate. Description held substantially correct. *Dobson v. Sotheby*, 1 Moody & M. 90. (22 E. C. L. 481.) 1827.

§ 5. One condition attached to the policy provided that a misdescription of the property insured, so that the same might be taken at a less rate, &c., should avoid the policy. The property insured was described as contained in a two-story frame house, filled in with brick, No. 152 Chatham street." The house No. 152 Chatham street was a frame house not filled in with brick; *Held*, that the words of description, "filled in with brick," were a warranty, which being untrue, avoided the policy. *Fowler v. Aetna Ins. Co. of N. Y.* 6 Cow. N. Y. 673. 1827.

§ 6. Rule annexed to policy stated, that persons desirous of making insurance on buildings should state in writing the following particulars, to wit: "Of what materials the walls and roofs each are constructed," &c. "And if any person shall cause the same to be described in the policy otherwise than as they really are, so as the same be charged at a lower premium than would otherwise be demanded, such insurance shall be of no force." *Held*, that a misdescription would not avoid the policy, unless a lower rate of premium was charged in consequence of it, and whether such misdescription reduced the premium which would otherwise have been demanded, was a question of fact which the jury alone could decide. *Columbian Ins. Co. v. Lawrence*, 2 Pet. U. S. 25. 1829.

§ 7. Policy describing the premises as a house, bounded in rear by a stone building covered with tin, and by a yard, in which yard there was being erected a first-class store, which would communicate with the building insured; *Held*, to be incorrect and therefore null, it being proved that there was between the house and the stone building a brick building covered with shingles communicating to both by doors. *Casey v. Goldsmid*, 2 Lower Canada R. 200. 1852—but see *post*, § 9.

§ 8. Description of building to be insured, was made by an agent of the company, who gave a written description of the property to the company, including a kitchen, which applicant intended to build, and which was built after issue of the policy and before the fire. If objection be taken by the company that the description of the kitchen building was erroneous, the insured may show, by verbal testimony, that it was in contemplation at time of making policy, and was therefore included in it, and may recover for the loss of it, and if it appear, by the evidence, that the additional building did not conform to the intention of the assured, as communicated to the agent of the company at time of application, the variation would not

of itself avoid the policy. It stands upon the principles of an alteration, and avoids the policy only in case the risk is thereby increased, which is a question of fact, to be determined by the jury. *Perry Ins. Co. v. Stewart*, 19 Penn. St. 45. 1852.

§ 9. The case reported, *ante*, § 7, reversed and judgment given for the assured, inasmuch as the omission to mention such doors in the description, was not proved to have been a fraudulent concealment, and inasmuch as it was not established that the fire had been occasioned and had extended by means of such apertures. *Casey v. Goldsmid*, 4 Lower Canada, Q. B. Appeal Side, 107. 1854.

§ 10. There is an implied warranty that the description of the property insured, contained in the policy, is correct at the date of the policy, and that no alteration should be made afterwards so as to increase the risk. In October, 1850, G. S. & Co. sent to agents in London a description of their two-story house in San Francisco, Cal., to be insured. Policy was executed April 7th, 1851, describing the building as a two-story house. On the 26th of March, 1851, G. S. & Co. commenced putting on a third story, which was completed May 3d, of which the underwriters were not informed; *Held*, that the insured could not recover on the policy. *Pim v. Reid*, 6 Man. & Grang. 1, commented on, explained, or overruled. *Sillem v. Thornton*, 3 Ellis & Bl. 868, (77 E. C. L. 808.) 1854.

§ 11. The error of an insurance company's agent, in making and transmitting to the head office, a diagram of the buildings insured, by means of which the buildings are described in the policy as "detached" instead of "as connected with other buildings," cannot deprive the assured of his remedy on the policy; and to a plea setting up that the policy was obtained by false and fraudulent misrepresentations, as to the building being "detached" and

as to the number of the occupants, and that thereby the conditions of the policy were broken, and the plaintiff deprived of all benefit under it, the plaintiff is entitled to answer, denying such misrepresentations, and alleging the visits of the company's agent to the insured premises, and his doings as to the making and transmitting of an erroneous diagram. *Somers v. Atheneum Fire Assurance Co.* 9 Lower Canada S. C. Montreal, 61. 1858.

§ 12. Insurance on premises in which was a steam engine which was mentioned in the policy. The engine was then used to hoist goods, of which the company was notified. Afterwards machinery was put up for grinding, and attached to the engine, of which the company had no notice, and subsequently a renewal of the policy was executed. Condition that every policy will be void, unless the nature and material structure of the buildings and property insured be fully and accurately described, &c. *Held*, that the alteration did not render the description in the policy inaccurate within the meaning of the condition, so as to avoid the policy. *Baxendale v. Harvey*, 4 Hurl. & Norm. Exch. 445. 1859.

§ 13. Application stipulated that the insurer would not be bound by any acts or statements made by or to any agent, unless contained in it, and that applicant should be liable for all statements in application, if made through an agent. The subject to be insured was described in application, as a "stone dwelling house," without disclosing the fact that there was a wood kitchen attached, although such fact was well known to the agent. *Held*, that the company's proposition was to insure a "stone" dwelling house, and assured accepted this proposition, and, as the house was part wood and part stone, it was not embraced in the proposition, and no contract to insure such a house was ever made, and assured could not recover; and that the knowledge of the agent was immaterial. *Chase v. Hamilton Ins. Co.* 20 N. Y. 52. 1859. Reversing 22 Barb. N. Y. 527. 1856.

§ 14. Where policy describes the interest insured as a "mechanic's lien," it covers both a lien belonging to assured alone and his interest in one held by him and two others jointly, and parol evidence is admissible to show, that the intention was to insure such separate and joint liens. *Longhurst v. Conway Fire Ins. Co.* U. S. D. Ct. Northern Division, Iowa, October Term. 1861.

§ 15. A building having five floors above the sidewalk is properly described in a policy as a five-story building. The cellar is not a story in the ordinary sense of that word. *Benedict v. Ocean Ins. Co.* 1 Daly, N. Y. 8. 1860.

§ 16. Where it is shown that an insurance company prepared a policy of insurance after a careful examination of the insured premises by their own surveyor, and with a full knowledge of the nature of the risk, any misdescription of the policy must be deemed the fault of the company, and the insured should not be called upon to bear the consequences. *Benedict v. Ocean Ins. Co.*, 1 Daly, N. Y. 8. 1860.

§ 17. An insurance on "merchandise" such as is usually kept in country stores, is not void because hardware, china, glass-ware, looking-glasses, &c., were not specifically mentioned, if the articles were such as are usually kept in country stores. *Franklin Fire Ins. Co. v. Updegraff*, 43 Penn. St. 350. 1862.

§ 18. Where one of the conditions of a policy was that "a false description, or the omitting to make known any fact or feature in the risk which increases the hazard," shall render the policy void; and the application, which was made a part of the policy, described the building insured to be a wooden four-story paper mill, 60x70 feet from above basement, ten feet between floors, and ceiled with wood," and not only made no mention of a brick "bleach-house," 20x30 feet, which was separated from the

paper mill by a wooden shed-roofed building, known as a "salt-box," 24x18 feet, and 14 feet high, one end of which was formed by the paper-mill and the other by the bleach-house, but, on the contrary, in answer to a written question, the application declared there was no building within 300 feet of the mill, except the "stock-house," which was other than the "bleach-house" or "salt-box." *Held*, that whether the "bleach-house" and "salt-box" were a part of the paper-mill or not, the warranty on the part of the insured was broken. *Day v. Conway Ins. Co.*, 52 Me. 60. 1862.

§ 19. An agent of an insurance company who is authorized to issue policies, &c., may, after a policy has been delivered by him, and before the receipt of the premium, correct a misdescription in the name of the street on which the property insured is situated. *Warner v. Peoria Marine and Fire Ins. Co.*, 14 Wis. 318. 1863.

§ 20. Where the plaintiffs, as mortgagees of a part of the machine-works and buildings occupied by the mortgagor, procured a policy of insurance upon their interest, covering all the said works and buildings; *Held*, that in an action on such policy, the plaintiffs could recover the amount of their policy, if the loss upon the machine works and buildings covered by the mortgage was more than the amount insured. *Fox v. Phenix Fire Ins. Co.*, 52 Me. 333. 1864.

§ 21. A description of property to be insured as "The five-story building and three-story addition known as the Lawrence Block, occupied as stores on the first floor, the upper portion intended for a hotel, and to be unoccupied during the continuance of this policy," is not a warranty that all the rooms on the first floor were occupied; and if any of the rooms on that floor were occupied as stores, the others remaining unoccupied, the language of the policy is met. *Carter v. Humboldt Fire Ins. Co.*, 17 Iowa, 456. 1864.

§ 22. Describing a building as a five-story brick building, and making no mention of a cellar under it, is not a misdescription, though there be a cellar under the building. *Benedict v. Ocean Ins. Co.*, 31 N. Y. 389. 1865.

§ 23. If there be such a variance between the description of property intended to be insured and its actual description as will amount to a breach of warranty in any material respect, the policy will be void, although the insured intended to effect an insurance on the property by whatever description might be correct. *Tesson v. Atlantic Mut. Ins. Co.*, 40 Mo. 33. 1867.

See Application, § 5, 20, 22, 23, 31. Construction, 2. Parol Evidence, 3. Title, 38. Warranty and Representation, 14, 15, 16, 18. What Property is Covered by Policy, 8.

DISTANCE OF OTHER BUILDINGS.

§ 1. Where assured represented the ground adjoining the property to be insured as "vacant," and, subsequent to the insurance, other buildings were erected; *Held*, that there was no continuing warranty that the ground should remain vacant during the term of policy, and there being no prohibition in the policy against the erection of such buildings, the assured might recover. *Stebbins v. Globe Ins. Co.*, 2 Hall, N. Y. 632. 1829.

§ 2. The insured, in reply to interrogatory as to the distance of other buildings, omitted to mention certain wooden buildings standing forty-nine feet off from the building insured, on another street, from which fire was accidentally communicated to the property insured; *Held*, that if, as a man of ordinary capacity, the assured ought to have apprehended that a fire originating in said wooden buildings would have endangered his house, then he ought.

to have named those buildings in reply to the interrogatory propounded; for what a man ought to have known he must be presumed to have known. But this knowledge must be something more than that, by possibility, a fire so originating might have endangered his house. *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125. 1841.

§ 3. In reply to the question in application "as to distance of other buildings," answer was, "East side of the block, small one-story sheds, and would not endanger the building if they should burn." The fire was communicated through one of the buildings referred to, and caused the destruction of the property insured. *Held*, that it was not a misrepresentation, but an error of judgment, and did not avoid the policy. *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125. 1841.

§ 4. Where the assured, in his written application, in answer to the following question, viz: "Relative situation as to other buildings—distance from each, if less than ten rods," mentioned five buildings, but omitted to mention several others within ten rods, and the policy contained the following clause: "Reference being had to the application for a more particular description, and as forming a part of this policy;" *Held*, that the statement in the application was a warranty, and that the existence of other buildings within the prescribed distance avoided the policy, whether that fact was material to the risk or not. And where one of the conditions of insurance was, that any misrepresentation or concealment in the application should render the policy void and of no effect; *Held*, that any misrepresentation or concealment, however immaterial, would render the policy void. *Burritt v. Saratoga County Mut. Fire Ins. Co.*, 5 Hill, N. Y. 188. 1843.

§ 5. Where a by-law of a mutual company provided that the application should contain a full description of certain things, among which were the "situation of in-

sured property with respect to other buildings," and that assured himself or the surveyor might make it, but that in either case the assured should be bound by the representations therein made, and the surveyor should be deemed the agent of the applicant; and, in answer to the question in application, "relative situation of other buildings, distance from each if less than ten rods," &c.; the reply was, "The building in which stock is deposited is 40x90 feet; two stove-pipes enter chimneys, well secured; the boiler of the engine is carefully secured by a double arch with a flue passing into a chimney" and upon the trial it was proven that the tannery and saw-mill stood within less than five rods of each other, and the dwelling within less than ten rods of both buildings; *Held*, that the failure to make known the proximity of the buildings to each other in reply to the question, avoided the policy under the by-laws above mentioned. *Susquehanna Ins. Co. v. Perrine, 7 Watts & Serg., Pa. 348. 1844.*

§ 6. Where the policy was on mill, machinery and fixtures, and conditions, among other things, required the application to be in writing, "the relative situation of other buildings if within less than ten rods," &c.; and in application was the question, "relative situation of other buildings if within less than ten rods," and applicant failed to make known all the buildings within that distance; *Held*, that the condition had no reference to anything but the insurance on the building, and, so far as it was concerned, as well as machinery, there could be no recovery; but, that the condition not referring to personal property, assured might recover for the loss of personal property. *Trench v. Chenango County Mut. Ins. Co., 7 Hill, N. Y. 122. 1845.*

§ 7. The policy referred to the application as forming a part of it. The conditions required that the application should state the situation of the property insured; its relative situation as to other buildings; distance from each if less than ten rods, &c.; and further provided that

in all cases the assured should be bound by the application, and that any misrepresentation or concealment in the application, would render the insurance void. The application represented the building to be insured to be a grist mill, and stated: "This mill is bounded by space on all sides." *Held*, that this amounted to a warranty that there was no building within ten rods, and as the proof showed that there was a building within ten rods, the insurance was void; and the fact that the agent of the company knew of the building, and that the omission to mention it in the application was due to his ignorance, carelessness or bad faith, made no difference. *Jennings v. Chenango Mut. Ins. Co.*, 2 Denio, N. Y. 75. 1846.

§ 8. In an application for insurance on personal property, which application was referred to in the policy as forming part thereof, was written, in answer to the question "where situated, of what materials, and size of building, &c., and relative situation as to other buildings, distance from each if less than ten rods," a description of several buildings standing within ten rods on the several sides of the one in which the insured goods were, but several others beyond them, but within the distance of ten rods, were not mentioned. On the above facts, the court say, "I think there can be no doubt but that, had this been an insurance upon real estate, the statement as to the distance of the buildings would have been a warranty. But it is said that the rule is different in case of personal property. If this be law, I doubt very much whether it is applicable where personal property only is insured, and the statement respecting other buildings within ten rods can only refer to those within ten rods of that in which the goods are kept. *Sexton v. Montgomery County Mut. Ins. Co.*, 9 Barb. N. Y. 191. 1848.

§ 9. Application was referred to and made part of the policy; and, in answer to question as to relative distance of other buildings within ten rods, assured failed to

state one or more within that distance. *Held*, that it was a breach of warranty that avoided the policy. *Frost v. Saratoga County Mut. Ins. Co.*, 5 Denio, N. Y. 154. 1848.

§ 10. Where the question in application, which was referred to and made part of the policy, was as follows: "How bounded, and distance from other buildings if less than ten rods," &c.; and the answer stated all the nearest buildings on each side of the property insured, but did not state all the buildings within ten rods; *Held*, that the answer was sufficient, for the question required the distance from the nearest buildings if within ten rods, not the distance from all buildings within ten rods. *Gates v. Madison County Mut. Ins. Co.*, 2 Comst. N. Y. 43. 1848. Same case, 1 Seld. N. Y. 469. 1851. 3 Barb. N. Y. 73. 1848, reversed.

§ 11. Application was referred to as forming part of the policy, one question of which was: "How bounded, and distance from other buildings if less than ten rods," &c. The surveyor and agent of the company, who by a condition of policy was made the agent of the applicant, examined the premises alone, and put in, as answer to the question, the nearest buildings, without mentioning others that were within ten rods. *Held*, that the putting down the nearest buildings only, did not amount to a warranty that there were no others within the distance of ten rods, and that, if there were other buildings, it only amounted to a withholding information called for by the interrogatory; upon which the question would arise whether it is material to the risk, which is a question of fact proper to be submitted to the jury. *Masters v. Madison County Mut. Ins. Co.*, 11 Barb., N. Y. 624. 1851.

§ 12. Where, in an insurance on goods, the application was referred to as forming part of the policy, and the assured, in answer to a question in the application, failed to state all the buildings within ten rods; *Held*, that the statement in the application was a warranty that no other

buildings than those mentioned existed within ten rods, and that his failure to name all avoided the policy, although the agent of the company filled up the application, and knew of the existence of the other buildings. *Kennedy v. St. Lawrence County Mut. Ins. Co.*, 10 Barb. N. Y. 285. 1851.

§ 13. In a policy on merchandise containing same condition in policy and question in application as in 5 Hill, 188, *ante*, § 4, and where application was made out by the agent of the company, but signed by the assured, and such application omitted to disclose several buildings within ten rods, the policy was held void as to merchandise, overruling the distinction taken in 7 Hill, 122, *ante*, § 6. *Wilson v. Herkimer County Mut. Ins. Co.*, 2 Selden, N. Y. 53. 1852.

§ 14. Where insured in his application stated that two buildings were to be moved fifteen feet, and a loss occurred before removal; *Held*, insured were entitled to a reasonable time to remove them, and what was a reasonable time was a question for the jury. *Lindsay v. Union Mut. Fire Ins. Co.*, 3 R. I. 157. 1855.

§ 15. A question in application as to relative situation of other buildings, was answered as follows: "A dwelling-house and cabinet-maker's shop 'with' fifty feet;" *Held*, that the true construction of the answer was, that the buildings were "within" fifty feet, and the answer was correct, although one of the buildings was within three feet; also, that being the construction of a written instrument, where no question arose as to the use of words of art, it was a question for the court to determine. *Allen v. Charlestown Mut. Ins. Co.*, 5 Gray, Mass. 384. 1855.

§ 16. Where policy provided that representations should be deemed warranties, and the insured, in reply to

question as to adjacent buildings, said, "see diagram;" *Held*, that there was no warranty of the correctness of the diagram. *Sayles v. Northwestern Ins. Co.*, 2 Curtis, C. C. U. S. 610. 1856.

§ 17. Relative situation of other buildings being required in application, which was expressly made part of the policy, the assured answered: "Dwelling about four feet distant on one side; about fifteen feet to small dwelling and store-house." At bottom of application assured stipulated that above was a full and true exposition of all facts, &c., "so far as the same are known to the applicant." It appeared in evidence that there were several other buildings on other sides of the property insured, besides those mentioned in the application. *Held*, that if the existence of these other buildings was not known to the assured or his agent who made the application, the omission to mention them would not prevent a recovery. If the insurers desired more exact information, other questions should have been put accordingly. *Hall v. People's Mut. Ins. Co.*, 6 Gray, Mass. 185. 1856.

§ 18. The application, which was expressly referred to in the policy as forming a part of it, contained this, among other questions: "Relative situation of other buildings; distance from each within ten rods; for what purpose occupied." In reply assured simply named several buildings. At the bottom of the application was this statement, just above the signature: "All of the exposures within ten rods are mentioned." *Held*, that giving the language used a fair construction, assured must be regarded as asserting that the buildings named were all the buildings within ten rods; and, it appearing that there were other buildings not named within that distance, he could not recover. The word "exposures," at the foot of the application, does not limit the answer required to a statement of those buildings from which danger of fire was to be apprehended. *Chaffee v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 376. 1858.

§ 19. Where the application contained the interrogatory, "Relative situation as to other buildings, distance from each within ten rods," to which assured replied by specifying several buildings, with distances; *Held*, that this constituted a warranty that there were no other buildings within ten rods of the stores insured, which exposed them to loss or injury by fire. And Judge Strong, who writes the opinion, states that the assured cannot introduce evidence to show as matter of estoppel, that the agent of the company prepared the application and answers, which were assigned by assured, on the strength of the agent's statement, that they were correct.

When in reply to said interrogatory in the application, assured mentioned certain buildings, and stated that they were contiguous to other buildings; the general expression, "other buildings," embraces all buildings not specified, and there is no warranty that there are no other buildings than those specified. *Brown v. Cattaraugus County Mut. Ins. Co.* 18 N. Y. 385. 1858.

§ 20. The application contained this interrogatory: "What is the distance and direction of said building from other buildings within one hundred feet? Annex a ground plan to the application." Assured replied: "See diagram." The diagram did not show all the buildings within one hundred feet. The application was, by the terms of the policy, made a part of it and a warranty on the part of assured. *Held*, that there was a warranty by assured, that his diagram stated all buildings within one hundred feet; and, as it did not do this, he could not recover. *Tebbetts v. Hamilton Mut. Ins. Co.* 1 Allen, Mass. 305. 1861.

§ 21. Policy stipulated that "applications for insurance must specify the construction and material of buildings within eight rods of the risk or property to be insured;" and in the application, which was referred to and made part of the policy and warranty on the part of the insured, was this question, "State distance, occupation

and materials of other buildings," answered as follows: "North 20 feet, brick dwelling; east 30 feet to alley and no exposure; south 64 feet, street; west 64 feet, street." The evidence showed that there were a number of other buildings within the eight rods, not mentioned in the answer of assured, and also that the agent of the company, entrusted with blank policies and empowered to make contracts of insurance, not only filled up the application in question, but also knew of the existence of all the buildings not mentioned by assured. *Held*, that there was a difference between a surveyor, only authorized to receive and forward applications to the company, and an agent authorized to issue policies, and that the latter stood in place of, and for the purpose of making insurances was the company, and in accepting an application in which some of the questions were not fully answered, and issuing a policy thereupon with a full knowledge of the state of facts existing as to the other buildings, the company could not set up in defense the failure on the part of assured to more fully answer the questions, as a misrepresentation or breach of warranty avoiding the contract. *Longhurst v. Conway Fire Ins. Co.* U. S. Dis. Ct. Northern Division, Iowa, October. 1861.

§ 22. Where the assured signed the application in blank, and agreed with the agent that the latter should make the survey and it was so filled up as not to show correctly the occupancy and distance of other buildings within six rods, but the agent knew the situation and occupancy of the same; *Held*, first, that the question, whether there had been a misrepresentation or concealment material to the risk, on the part of the assured, was for the jury to determine; second, that notwithstanding a by-law which provided that "in case the application is made through an agent, the applicant shall be held liable for the representation of such agent," the company were chargeable with the knowledge of the agent, and were estopped to set up a misrepresentation or concealment of

such facts as a defense; and that the agent need not have a personal knowledge, by acquaintance with or examination of the premises, but that knowledge derived from any source, would be sufficient to estop the company. *Clark v. Union Mut. Fire Ins. Co.* 40 N. H. 333. 1860.

See Application, § 29, 32, 46. Concealment, 11. Construction, 10. Increase of Risk, 1, 2, 10. Questions for Court and Jury, 9. What Property is Covered by the Policy, 22.

DIVIDENDS.

§ 1. The interest on the capital stock and the premiums constitute the ordinary fund out of which losses are to be paid; and the surplus of that fund, after paying such losses, are the surplus profits, which alone are to be divided among the stockholders. The capital is security for extraordinary losses. Unearned premiums are surplus funds, but not surplus profits; and should not be divided without leaving enough on hand to meet probable losses. *De Peyster v. American Fire Ins. Co.* 6 Paige, Ch. N. Y. 486. 1837. *Scott v. Eagle Fire Ins. Co.* 7 Paige, Ch. N. Y. 198. 1838.

§ 2. A creditor for money loaned, in the absence of express contract, has no special lien on the surplus funds of a company, and no preference over any other creditor in the distribution of such funds. *De Peyster v. American Ins. Co.* 6 Paige, Ch. N. Y. 486. 1837.

§ 3. A corporation is not justifiable in treating as profits, subject to be divided, premiums received upon unexpired risks, when it has not a fund sufficient, independent thereof, to meet all liabilities that might accrue on the pending risks. *Lexington Life, Fire & Marine Ins. Co. v. Page*, 17 B. Monroe, Ky. 412. 1856.

§ 4. When suit was brought against the directors and stockholders of an insurance company by a creditor, five years after the declaration of an illegal dividend to the stockholders; *Held*, that dividends declared by the directors and received by the stockholders, may be reclaimed by the directors, if illegally declared under a misapprehension of the right to declare them; and if there be an assignment by the corporation to a trustee, such right to reclaim dividends, improperly paid, passes to the assignee, if the terms of the assignment are sufficiently comprehensive to embrace them. *Lexington Life, Fire & Marine Ins. Co. v. Page*, 17 B. Monroe, Ky. 412. 1856.

§ 5. Independent of any specific agreement between insurers and the insured, the ordinary currency of the country would be considered as the basis upon which the policies were issued, and upon which any settlement of losses incurred should be made, and profits realized. But where there is a special contract that the premiums shall be paid in gold, and the losses be paid in the same currency, the company on declaring its dividends should allow the holders of such policies a certificate for their share of the profits in accordance with a gold standard, as compared with currency. *Luling v. Atlantic Mut. Ins. Co.* 45 Barb. N. Y. 516. 1865.

See Mutual Companies and Members of, § 12.

DURATION.

§ 1. Policy against loss by fire from half year to half year, premium to be paid half yearly, within fifteen days after the expiration of the former half year, as long as insurers should agree to accept the same, with stipulation that there should be no insurance until the premium was

actually paid. The loss happened within fifteen days after the expiration of a half year, but before the premium for a succeeding half year had been paid. *Held*, that the insurers were not liable, though the premium was tendered within the fifteen days. *Tarleton v. Staniforth*, 5 Durnf. and East. 695, 34 Geo. III. Affirmed in Exchequer Chamber, 1 Bos. & Pul. 471. Same case, 3 Anstruther, 707. 1796.

§ 2. By a policy under seal, referring to certain printed proposals, a fire office insured certain premises from 11th November, 1802, to 25th December, 1803, for a certain premium, which was to be paid yearly on each 25th December, and the insurance was to continue so long as the insured should pay the premium at the said times and the office should agree to accept it. By the printed proposals, it was stipulated that the assured should make all future payments annually at the office, within fifteen days after the day limited by the policy, under penalty of forfeiture of the benefit thereof, and that no insurance was to take place until the premium was paid. By a subsequent advertisement (agreed to be taken as a part of the policy), the office engaged that all persons insured there by policies for a year or more had been and should be considered as insured for fifteen days beyond the time of expiration of their policies. Before the expiration of the year, the office notified the assured that they would not continue the insurance, unless he paid an increased premium; to which assured replied that he would not pay the increase of premium. *Held*, that the office was not liable for a loss, which happened within the fifteen days from the expiration of the year for which the insurance was made, although the assured, after the loss and before the fifteen days expired, tendered the increased premium which had been demanded. The effect of the whole contract, &c., taken together, being only to give the assured the option to continue the insurance or not, during the fifteen days after the expiration of the year, by paying the premium for the year ensuing, notwithstanding any

intervening loss, provided the office had not, before the end of the year, determined the option by giving notice that they would not renew the contract. *Salvin v. Langston*, 6 East, 571. 1805.

§ 3. Policy for a year, with condition that "no policy will be considered valid for more than fifteen days after the expiration of the period limited therein, unless the premium," &c., are paid. And in case of assurances for a less period than a year, they "will terminate at six o'clock on the evening of the day specified with the allowance of fifteen days." *Held*, in effect, an insurance for one year and fifteen days. *McDowell v. Carr, Hayes & Jones*, 256. 1833.

§ 4. A policy of insurance upon merchandise continues in force so long as the goods remain in the building specified therein, during the time it has to run, unless the contract is modified by the assent of both parties. Insurers who are bound by the terms of the policy, for a loss occurring during the time covered by it, if they claim any variation of their original responsibility by a new agreement, must establish it by clear and indubitable evidence. *Kunzze v. American Exchange Fire Ins. Co.* 2 Robert. N. Y. 443. 1864.

See Covenants to Insure, § 4. Premium Notes, 29.

ENCUMBRANCE.

§ 1. Bill to enforce collection of quotas against premises, which were mortgaged when declaration for insurance was made. *Held*, that the Virginia acts, 1794 and 1795, governing in this case, did not contemplate insurance of mortgaged estates, or other than fee simple estates, and that the insurance was void. Bill dismissed. *Ingrams v. Mutual Assurance Society*, 1 Rob. Va. 661. 1843.

§ 2. Where policy required a disclosure of the extent and nature of the interest, if less than a fee simple, together with every incumbrance calculated to affect the interest, and a mortgagee insured his mortgagee interest, but failed to disclose the existence of other mortgages on the same property; *Held*, that the policy was void. *Addison v. Kentucky & Louisville Ins. Co.* 7 B. Monroe, Ky. 470. 1847.

§ 3. A failure on part of the assured to disclose the existence of a mortgage on the property, is not a circumstance material to the risk, and will not avoid the policy. (Case does not say whether inquiry was made or not.) *Delahay v. Memphis Ins. Co.* 8 Humphrey, Tenn. 684. 1848.

§ 4. Where reference was had to application, as forming part of the contract, and application declared that, if assured "shall suffer a judgment or decree, operating as a lien on said property, or any part thereof, to pass against him, the policy shall be void, unless he shall make a representation thereof in writing to the directors;" *Held*, that this clause constituted an express warranty, and, if a breach should be shown, the policy was void. *Egan v. Mutual Ins. Co. of Albany*, 5 Denio, N. Y. 326. 1848.

§ 5. An untrue answer in application, in reply to a question respecting encumbrances, renders the policy void in a mutual company. And it makes no difference that the company was incorporated under the laws of another State, and whether or not they were entitled to a lien on the premises insured. *Davenport v. New England Mut. Ins. Co.* 6 Cush. Mass. 340. 1850.

§ 6. The agent of the company went to examine and make survey of a mill to be insured, and was accompanied by the son of the applicant, and, at the time of making the application, the son informed the agent of the exist-

ence of a mortgage on the premises, but agent did not put it in the application. There was a by-law of the company, making the surveyor the agent of the applicant, but none requiring a disclosure of encumbrances, though in the application there was this question: "What encumbrances, if any, on the premises?" *Held*, that the notice to the agent was sufficient notice to the company of the existence of the mortgage. *Masters v. Madison County Mut. Ins. Co.* 11 Barb. N. Y. 624. 1851.

§ 7. Where the insured effected a policy on a certain mill, machinery, tools and lot, his interest being stated to be a mortgage for \$4,000 on said property, and, after loss, it turned out that he held two other prior mortgages on the real estate and machinery, which were not disclosed, (no inquiry having been made concerning them); *Held*, that the only interest insured was that under the \$4,000 mortgage; and that the existence of the prior mortgages was material, and should have been disclosed. *Smith v. Columbia Ins. Co.* 17 Penn. St. 253. 1851.

§ 8. The application represented the premises to be mortgaged for \$2,000, and the applicant took a policy payable, in case of loss, to the mortgagee. The encumbrance, in fact, amounted to \$3,800. *Held*, that this was a material misrepresentation, and avoided the policy; and that the misrepresentation was not relieved or excused by the fact, that an agent and director of the company assisted the assured in drawing it up. *Lowell v. Middlesex Mut. Fire Ins. Co.* 8 Cush. Mass. 127. 1851.

§ 9. The application contained the following clause: "And the said applicant covenants and agrees with said company that the foregoing is a correct description of the property requested to be insured, so far as regards the risk on the same." It also contained the following clause: "The applicant will bear in mind that the misrepresentation or suppression of material facts will destroy his

claim for a damage or loss." *Held*, that the phrase, "so far as regards the risk," in the case of this insurance, did not limit and confine the general rule—which avoids policies for false representations—to those representations that relate to the exposure. And as the assured, in this case, stated that there were no encumbrances, when there were several mortgages, his policy was void. *Friesmuth v. Agawam Mut. Ins. Co.* 10 Cush. Mass. 588. 1852.

§ 10. If the property is represented as unencumbered, when in fact it has been sold for taxes, it is a misrepresentation that will avoid the policy. *Wilbur v. Bowditch Mut. Ins. Co.* 10 Cush. Mass. 446. 1852.

§ 11. Where applicant stated that the premises to be insured were encumbered for "about \$3,000," when in fact there was a mortgage on them for \$4,000; *Held*, that the representation as to encumbrance was a material one, which assured was bound to make substantially true; and that having failed to do so, he could not recover. *Hayward v. New England Mut. Ins. Co.* 10 Cush. Mass. 444. 1852.

§ 12. Where charter provided that, "if the premises be encumbered, the policy shall be void, unless the true title of the assured and encumbrances thereon be expressed," and in application, which was made part of the policy, in answer to the question, "What is the title and whether encumbered?" assured replied, "on leased ground, six years to run," but did not mention a deed of trust for \$600 then on house and lot; *Held*, that the failure to disclose that fact avoided the policy, whether material or not, as the representations, being referred to and made part of the policy, became warranties. *Loehner v. Home Mut. Ins. Co.* 17 Mo. 247. 1852.

§ 13 Policy covered real and personal property. In reply to the question in the application, "is the property

encumbered?" answer was made, "mortgage about \$4,000 to A. B.," when in fact there were two mortgages—one for \$3,600 to A. B. on real and personal property, and one to J. P. on real estate for \$1,100. *Held*, that the misrepresentation avoided the policy, both as to real and personal property. *Brown v. People's Mut. Ins. Co.* 11 Cush., Mass. 280. 1853.

§ 14. If a representation as to encumbrances upon the property is untrue, but not fraudulently made, and the agent of the company knows the true state of the facts, and writes the statement from his own knowledge, and fails to state it truly, such misrepresentation will not avoid the policy, although the statement is adopted and signed by the agent of the insured. *Protection Ins. Co. v. Harmer*, 2 Ohio St. 452. 1853.

§ 15. By a condition annexed to a policy of insurance, it was declared that, in case an "encumbrance should fall or be executed upon the property insured, sufficient to reduce the real interest of the insured in the same to a sum only equal to or below the amount insured, and the insured should neglect or fail to obtain the consent of the company thereto, then and in that case the policy should be void." The policy was on personal property, which was afterwards mortgaged to an accommodation endorser, and the policy was assigned to the mortgagee with the consent of the company. *Held*, that there continued to be an insurable interest, and that the policy remained good notwithstanding the mortgage, and no matter whether the mortgagor or mortgagee was to be deemed "the insured" within the meaning of the condition. *Allen v. Hudson River Mut. Ins. Co.* 19 Barb. N. Y. 442. 1854.

§ 16. In reply to the question in application as to encumbrances, the assured truly stated the encumbrances then existing, but, after making the application on the 17th of July, on 25th of same month, when policy

was signed, he had made another mortgage on the premises for \$5,000, and on the 11th of October following, a second one for \$1,100. The company defended on this ground, but it was *Held*, that there was no misrepresentation as to encumbrances, the assured having stated truly those existing at the time of application. *Howard Ins. Co. v. Bruner*, 23 Penn. St. 50. 1854.

§ 17. A. made a written application for insurance on the 5th of October, and represented the property as "free of all encumbrance." The policy was not made out until the 11th of October, and, in the interval, after making application and before the execution of the policy, A. executed a mortgage on the insured property. *Held*, that the insured was not required to notify the company of the mortgage, as the charter and by-laws did not demand any notice of subsequent encumbrances. *Dutton v. New England Mut. Fire Ins. Co.* 9 Fost. N. H. 153. 1854.

§ 18. Policy was issued subject to the conditions and by-laws attached, one of which required a "true representation from assured as to title, interest and encumbrances." *Held*, that a failure on part of assured to disclose a mortgage, in reply to the inquiry on that subject in the application, avoided the policy, although the mortgage was not recorded till after the making of the policy. And the fact that insured did not acquire title till after the date of the mortgage, was immaterial; for the mortgage contained covenants of warranty, and he was estopped from denying his title. *Packard v. Agawam Mut. Fire Ins. Co.* 2 Gray, Mass. 334. 1854.

§ 19. The policy required notice of encumbrances; and it was claimed to be void because, under a prior policy which had become void, the insured had incurred a liability for assessments, which were a lien on the property. Whether such liability constituted an encumbrance within the meaning of the condition, left undecided; but *Held*,

that, *prima facie*, such liability ceased with the former policy, and that the question whether or not there was any such liability, was for the jury. *Jackson v. Farmers' Mut. Fire Ins. Co.* 5 Gray, Mass. 52. 1855.

§ 20. The application covenanted for a full and true exposition of all facts, so far as material to the risk. But the by-laws, to which the policy was in terms made subject, required the applicant to make a true representation of his title and interest in the property insured. The insured omitted to disclose a mortgage. *Held*, that his policy was void, and that it was irrelevant to inquire whether the omission was material to the risk. *Bowditch Mut. Fire Ins. Co. v. Winslow*, 3 Gray, Mass. 415. 1855.

§ 21. The application was referred to, made part of the policy, and signed by the assured. In reply to the question "Is the property encumbered? if so, how much, and to whom?" assured answered, "Mortgaged for \$1,100, to Wm. Cressy." In fact there was another mortgage of \$1,200 to B. previously existing, but Cressy had agreed to apply all payments on his mortgage to the extinguishment of the B. mortgage, and had placed the notes and mortgage in the hands of a third party for that purpose. *Held*, that as the B. mortgage was \$100 in excess of the Cressy mortgage, there had been a misrepresentation that avoided the policy. *Battles v. York County Mut. Ins. Co.* 41 Me. 208. 1856.

§ 22. Policy made a warranty of application, and required therein a recital of all encumbrances. The application in fact did not reply to the interrogatory on this subject, but the agent was informed of a mortgage of which he did not notify the company. At expiration of this policy, a renewal of policy on verbal request was issued, when the agent filled up an application and sent the same, unsigned, to the company. At its expiration

a second renewal policy was executed, and another unsigned application, filled out by the agent, was sent to the company; and during the term of this policy the property was burned. *Held*, 1st, that the unsigned applications sent were not acts of the insured, but were mere memoranda for the use of the company; 2d, that the company, having issued the policy with full knowledge of the mortgage on the part of its agent, was estopped from setting up want of notice to avoid the policy. *Ames v. New York Union Ins. Co.* 14 N. Y. 258. 1856.

§ 23. The application was referred to "as forming part of the policy," and one statement therein was, "no encumbrance but the Petrie mortgage;" the conditions of the policy also were made part of the policy, one of which required a full disclosure of all encumbrances. *Held*, that the above statement in application was a warranty that there was no other encumbrance than the Petrie mortgage; and it appearing that there was yet another mortgage, it was a breach of warranty that avoided the policy. *Smith v. Empire Ins. Co.* 25 Barb. N. Y. 497. 1857.

§ 24. The case quoted *Bowditch Mut. Fire Ins. Co. v. Winslow*, 3 Gray, 415, *ante*, § 20, again coming up for review, and it appearing that policy had been made payable to mortgagees with consent of company; *Held*, again, that the failure to disclose the \$800 mortgage was a material misrepresentation that avoided the policy in the hands of the assignee. 8 Gray, Mass. 38. 1857.

§ 25. Where a mortgagee interest was insured, and defence was that there were prior encumbrances not disclosed, and referee found that the agent of the insurance company knew of the prior encumbrances, that the application produced was in the hand-writing of such agent, and not signed by the assured, and was entirely blank as to the questions usually propounded, and especially as to

encumbrances, and that the objection was, therefore, untenable; *Held*, that there was no such mistake in this respect as would justify the setting aside of the referee's award. *Rex v. Insurance Companies*, 2 Philadelphia, Pa 357. 1858.

§ 26. The application contained the question, "Is the property encumbered by mortgage or otherwise?" To which the answer was, "No." In fact there was a mortgage for \$5,000. The policy, in express terms, made the application a part of it. *Held*, that the fact of this misrepresentation being admitted, its materiality appeared as matter of law, and that the policy was avoided. *Patten v. Merchants & Farmers' Mut. Fire Ins. Co.* 38 N. H. 338. 1859.

§ 27. One condition of the policy was as follows: "This policy is made and accepted in reference to the application for it, and to the conditions herein annexed, which are hereby made a part of the contract, and are to be resorted to in order to ascertain and determine the rights and obligations of the parties hereto, in all cases not herein otherwise expressly provided for. And the assured, by his acceptance of this policy, covenants and engages that the said application contains a just, full and true statement of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured, and that if any fact or circumstance shall not have been fairly represented, the risk taken by this company shall cease and this policy shall be void." Assured, by letter, applied to the agent of the company for insurance. Thereupon the agent filled out an application, which contained a statement that there was "no mortgage" on the property to be insured, and signed the name of assured to it, without the knowledge of assured. A policy was issued, referring to the application as part of the policy, which was accepted by assured with the application attached to the policy. *Held*, 1st, that by the acceptance of the policy, the assured covenanted and

engaged that the application contained a just, full and true statement in regard to the condition of the property insured, and that he thereby ratified the acts of the agent in filling and signing the application; 2d, that the representation as to the mortgage was material, though the company was a stock company and had no lien on the real estate; 3d, that the covenant as to "condition, situation, value and risk" of the property insured, included title and encumbrances as showing the insurable interest of the insured; and, lastly, that the contract was entire, and a misrepresentation as to one of the subjects insured avoided the entire policy. *Richardson v. Maine Ins. Co.* 46 Me. 394. 1859.

§ 28. Where policy provided that "all alienations and alterations in the ownership, situation or state of the property insured by this company, in any material particular, shall make void any policy covering such property, unless consented to or approved by the directors, in writing, within thirty days;" and subsequently to the making of the policy the assured made a mortgage on it to another party, without notice to or consent of the company; *Held*, that the making of the mortgage was a material alteration in the ownership of the property, within the meaning of the by-law, and avoided the policy. *Edmonds v. Mutual Safety Fire Ins. Co.* 1 Allen, Mass. 311. 1861.

§ 29. An application for insurance, which was referred to in policy and made a warranty on the part of the assured, stated the insurance to be \$1,500 on property below specified, to wit: "a mechanic's lien on the Lawrence Block," &c. The 10th interrogatory in application was: "Is the property insured?" Answer: "Lien insured for \$16,500 in other companies." The 11th question was: "Is it encumbered by mortgage or otherwise; if so, for how much?" To which answer was made, "No." In fact, besides the lien insured, there were two other liens on the building to the amount of \$14,000, and

also ground rent to the amount of \$1,500. *Held*, that there was no misrepresentation as to encumbrance, as the whole application, construed together, showed that the assured, in answering the question as to encumbrance, had reference to his lien; and that the word "it" immediately following assured's answer, "Lien insured for \$16,500," referred to the lien insured, and not to the building subject to the lien. *Longhurst v. Conway Fire Ins. Co.* U. S. D. Ct. Northern Division of Iowa, October Term, 1861.

§ 30. The facts in this case were, that the agent of the assured, before the application for insurance, had made an arrangement with the attorney of the mortgagee, who was foreclosing a mortgage then existing on the property, by which he paid him \$130, and attorney loaned him the balance necessary to pay off the mortgage by accepting his personal responsibility for such balance, and considered the mortgage as paid, and discontinued the suit for foreclosure. The agent of assured then told plaintiff that the mortgage was paid, and she made the application for insurance, representing that the property was not encumbered. *Held*, that this mortgage, though not discharged of record, was no longer an existing encumbrance on the land, and that assured had not therefore made any misrepresentation as to encumbrance. *Hawkes v. Dodge County Mut. Ins. Co.* 11 Wis. 188. 1860.

§ 31. An application for insurance on a building against fire, which by reference was made part of the policy, contained certain interrogatories and answers, and among them the following: "Do you own the land?" "Is it unencumbered by mortgage or otherwise?" "Yes." At bottom of application was this stipulation: "And the said applicant hereby covenants and agrees to and with the said company, that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are

known to the applicant and material to the risk." Previously to the issuing of the policy, the insured had executed a mortgage deed to a third party, to secure a large sum of money, which deed was then held by such person and, shortly thereafter, duly recorded; *Held*, that the unrecorded mortgage was an encumbrance within the meaning and object of the inquiry, and the assured not having disclosed in his answer the existence of such mortgage, the policy was void. That the covenant in the application of a full and true exposition, &c., "so far as known to the applicant and material to the risk, must be construed in connection with the specific inquiry, and that the company, by making a specific inquiry, showed that the answer to it was regarded as material to the risk, and assured could not now be heard to say it was immaterial. *Hutchins v. Cleveland Mut. Ins. Co.* 11 Ohio St. 477. 1860.

§ 32. In the application, which was made part of the policy, was this question: "Is it (property) encumbered by mortgage or otherwise? If so, for what sum? Answer, "No." At bottom of application was the covenant that the "above is a full, just and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant, and are material to the risk." The conditions annexed also contained similar covenants. In fact, there were two valid and unsatisfied mortgages on the property for \$5,000 each. The plaintiff offered parol evidence to show knowledge, on part of the agent of the company, of the existence of these mortgages, which defendants objected to, as being evidence to contradict or explain the contract. *Held*, that the evidence did not tend to contradict or explain the contract, nor to contradict the fact that the plaintiff had falsely answered the question, but merely went to show, that however incorrect the answer may have been, yet, as the agent, who wrote the answers in the application, had full knowledge of the facts misrepresented, the

company could not have been misled or injured by it, and it was therefore properly admitted. *Held*, further, that the company was chargeable with the knowledge of all the facts known to its agent, and that as the agent knew of the encumbrances, the misrepresentation of assured in regard to them, did not, in the absence of fraud, avoid the policy. *Patten v. Merchants' & Farmers' Mut. Fire Ins. Co.* 40 N. H. 375. 1860. (See same case, *ante*, § 26.)

§ 33. In a policy of insurance, insuring both real and personal property, a condition that if, during the life of the policy, an encumbrance fall or be executed upon the property insured, sufficient to reduce the real interest of the insurer to or below the amount of the policy without the consent of the insurance company, the policy shall be void, applies to both kinds of property and means that the owner's interest shall not be reduced by encumbrances below the amount insured without notice to the company. And in such case, if encumbrance fall upon the property, *e. g.* an attachment, the company, upon receiving notice, has the right to rescind the policy on repayment of a proportionate part of the premium. *Brown v. Commonwealth Mut. Ins. Co.* 41 Penn. St. 187. 1861.

§ 34. Where a policy provided that it should become void if an encumbrance fell upon the property without the consent of the insurer; *Held*, that after notice of liens against the property had been given by the insured to the insurance company, their consent to stand as insurers would be implied if there was no dissent. *Brown v. Commonwealth Mut. Ins. Co.* 41 Penn. 187. 1861.

§ 35. Where by its terms a policy is to be void "unless the true title of the assured and the encumbrances on the same be expressed therein," the existence of an encumbrance is a fact material, as a matter of law, to be disclosed; and, if not set forth, the policy will be void, unless it be shown that the encumbrance was known to the

insurer, and not fraudulently concealed. *Gahagan v. Union Mut. Ins. Co.* 43 N. H. 176. 1861.

§ 36. If an application for insurance is expressly made a part of a policy, an answer in the application falsely denying the existence of encumbrances on the property to be insured, will avoid the policy. *Murphy v. People's Equitable Mut. Fire Ins. Co.* 7 Allen, Mass. 239. 1863.

§ 37. An application for insurance was expressly made a part of the policy, and the policy was also made subject to the conditions and limitations expressed in the by-laws annexed, and those by-laws provided that the policy should be void, if the application should not contain a full, fair and substantially true representation of all the facts and circumstances respecting the property, so far as they were within the knowledge of the assured and material to the risk. The premises were subject to two mortgages made by the insured; and in reply to a question in the application, "Is the property mortgaged or otherwise encumbered, and to what amount?" the assured mentioned only one of the mortgages. *Held*, that the policy was void, and that the insured did not then recollect the other mortgage was immaterial. *Towne v. Fitchburg Mut. Fire Ins. Co.* 7 Allen, Mass. 51. 1863.

§ 38. A policy similar to that specified in § 37, will also be rendered invalid if, in reply to a question in the application calling for the amount of encumbrances, the answer was that there were two mortgages for \$2,700 in all, the first of which was for \$1,150, and the second for \$1,550, when in fact the first was for \$1,150 as principal, and for accrued interest, to the amount of \$300 more. *Jacobs v. Eagle Mut. Fire Ins. Co.* 7 Allen, Mass. 132. 1863.

§ 39. Where an insurance was made upon the liquors and furniture of a public-house, and in answer to an inter-

rogatory, the person whose property was insured stated that the liens upon her real estate amounted to a certain sum, when they really amounted to a much larger sum; and the condition of the policy stated that it should be void, if the answers thus made were not true; *Held*, that such answer was a warranty, and not merely a representation. *Pennsylvania Ins. Co. v. Gottsman*, 48 Penn. St. 151. 1864.

§ 40. A stipulation in an insurance policy requiring the person whose property is insured to give notice to the insurance company of an encumbrance or levy made upon the property insured, is a substantive and material part of the contract, and a failure to give such notice forfeits the policy. *Pennsylvania Ins. Co. v. Gottsman*, 48 Penn. St. 151. 1864.

§ 41. A bond for the conveyance of the premises insured, upon the payment of a sum of money at a specified time, is not an encumbrance on such premises, if the time has expired, and the money has not been paid, even if the obligor has verbally waived the time. *Newhall v. Union Mut. Fire Ins. Co.*, 52 Me. 180. 1863.

See Alienation, § 5, 64. Application, 43. Concealment, 13. Dependency of Policy and Premium Note, 14. Entirety and Divisibility of Policy, 2, 9. Estoppel, 3. Title, 15, 32, 41, 44. Written Portion of Policy, 8.

ENDORSEMENTS.

§ 1. The policy contained a provision requiring notice of other insurance to be given to the company and endorsed on the policy, or otherwise acknowledged in writing, and, in default thereof, declaring the policy void. In an action at law (16 Peters, 495, U. S.), the policy was

declared void for non-compliance with this provision. A bill in equity was now brought, charging that notice was given, and asking that the company be compelled to make the endorsement, and for other relief. The answer of the company was sworn to by the president, and denied the fact of notice. *Held*, that something more than the testimony of one witness was required to overcome the answer of the president; though he was not in the office at the time the notice was alleged to have been given, and that the proof of notice adduced was insufficient. On the question of the right to equitable relief under such circumstances, the court say, "Supposing the bill to be broad enough in its allegations, and the sending of notice of the second insurance proved, and the duty to acknowledge it, if received, to be clear, we might in most cases like this, enforce a discovery of the receipt of it, if coming to hand; and might enjoin the insurers against using, by way of defense, a circumstance caused by their own misconduct. *Baker v. Biddle*, 1 Baldwin C. C. 405. But whether we could go further, and enforce a recovery for the loss on the equity side of this court, need not now be decided." *Carpenter v. Providence Washington Ins. Co.* 4 How. U. S. 185. 1846.

§ 2. Under a clause in a policy of insurance which provided that it should become void on assignment, unless notice was given at the office of the company, and the same approved and endorsed on the policy by the secretary or other authorized officer; *Held*, an approval of and consent to an assignment, written and signed by the president on a separate piece of paper, and attached to the policy by a wafer, was sufficient. *Pennsylvania Ins. Co. v. Bowman*, 44 Penn. St. 89. 1862.

§ 3. Where property was insured by the original policy to the amount of \$200, and after the policy was forfeited by the introduction of new elements of risk, the company, with full knowledge of the facts, by an endorsement on the policy added \$100 to the risk on the

same property, and in the endorsement stated the whole risk as thus increased to be \$300; *Held*, that the forfeiture was thereby waived by the company. *Rathbone v. City Fire Ins. Co.* 31 Conn. 194. 1862.

§ 4. Where, after an insurance was effected by "S. and others," the property was sold to W., who at the same time mortgaged it back to S., to secure debts due to him and to C. & M., of which notice was given to the company, who indorsed upon the policy a consent that it should remain in force and not be avoided by the sale, which consent was signed by the president and secretary; *Held*, that the policy was not avoided by the sale, but that a suit might be maintained by S. for the benefit of himself and C. & M., and also that the president and secretary, who had given such consent, at the company place of business, were to be presumed to have authority to do the act, until the contrary was shown. *Sanders v. Hillsborough Ins. Co.* 44 N. H. 238. 1862.

§ 5. Where a notice of loss contains a statement that the building was lighted with burning fluid, and the memorandum of special hazards provides that the policy shall be void if burning fluid is used without permission in writing indorsed on the policy, no action can be maintained in the absence of such permission. *Campbell v. Charter Oak Fire & Marine Ins. Co.* 10 Allen, Mass. 213. 1865.

§ 6. An endorsement written by the insurers across the face of a policy of a privilege of additional insurance is a waiver of notice of such additional insurance. *Benedict v. Ocean Ins. Co.* 31 N. Y. 389. 1865.

See Application, § 23. Assignment, 33. Consummation of Contract, 11. What Property is Covered by Policy, 26.

ENFORCEMENT OF CONTRACT FOR POLICY.

§ 1. An agreement to insure may be specifically enforced; and, if a loss happen, payment may be compelled in a court of equity. *Carpenter v. Mutual Safety Ins. Co.* 4 Sandf. Ch. N. Y. 408. 1846.

§ 2. A court of equity may compel the delivery of the policy agreed and contracted for, either before or after the happening of the loss; and, being properly in that court, after a loss, may proceed and give such final relief as the circumstances of the case demand. *Tayloe v. Merchants' Ins. Co.* 9 How. U. S. 390. 1850.

§ 3. A policy was executed, and delivered to an agent of insurers, and then sent back for correction to general agent, who tore off the names of president and secretary and seal of the company, and afterwards, when requested to deliver the policy, refused to do so. *Held*, that this gave the insured a right to come into a court of equity for relief. *Chase v. Washington Mut. Ins. Co.* 12 Barb. N. Y. 595. 1852.

See Parol Contract, § 3. Pleading and Practice, 53.

ENTIRETY AND DIVISIBILITY OF POLICY.

§ 1. Policy covered insurance for different sums on several houses, with a clause that, if any building should contain any furnace or stove, used, &c., the policy

should be void in respect to such building. To a declaration setting out said several insurances, a plea was put in, as a defense to the whole count, that certain of the buildings did contain furnaces and stoves. *Held*, bad, for the policy might be void as to those buildings, and still the plaintiff be entitled to recover on account of the loss of other buildings insured in the policy. *Held*, further, that the plea that furnaces and stoves were contained, &c., was double. *Daniel v. Robinson*, Batty, 650. 1826.

§ 2. A policy was taken on shop, tools, fixtures and stock in trade—a separate amount on each; and one deposit note was given, and the sum of \$6.62 was paid for the premium on the whole property. The assured, in his application, stated that there was no encumbrance, when in fact there was a mortgage on the land on which the shop was built, and another mortgage on a portion of the tools. *Held*, that the entire policy was void. *Friesmuth v. Agawam Mut. Ins. Co.* 10 Cush. Mass. 587. 1852.

§ 3. Under a charter providing that the “true title of assured and encumbrances on buildings insured should be expressed, or policy would be void;” *Held*, that a failure to disclose a deed of trust on house and lot, though avoiding such policy as to house insured, would not avoid it as to furniture insured in the same policy, but separately appraised. *Loehner v. Home Mut. Ins. Co.* 17 Mo. 247. 1852. *Affirmed*, 19 Mo. 628. 1854.

§ 4. A policy was for “\$1,000, say \$700 on books and \$300 on music,” &c., with the clause that, if assured should thereafter make any other insurance on the insured premises the policy should be void, unless notice thereof should be given. *Held*, that the proper construction of the policy was, that if any part of the goods embraced in the policy were afterwards insured in another office, without notice, the whole policy became void. *Mason, J.*, dissenting, holding contract only void as to that part of

goods which had been insured in another company. *Associated Firemen's Ins. Co. v. Assum*, 5 Md. 165. 1853.

§ 5. A policy was taken in a stock company for \$1,150, to wit: \$1,000 on a factory and \$150 on a blacksmith shop, and contained a stipulation that if the premises should be put to a use denominated hazardous, &c., then, so long as the premises should be so used, the policy should be void. The factory was put to a use coming within this stipulation. *Held*, that the contract was entire, and that the policy was avoided as to both factory and shop. *Lee v. Howard Fire Ins. Co.* 3 Gray, Mass. 583. 1854.

§ 6. Where policy insured \$1,600 on dwelling-house and \$800 on furniture therein, and the application stated that there was "no encumbrance except the Petrie mortgage," when in fact there was another mortgage on the real estate; *Held*, that the policy was void, not only as to the house, but also as to the furniture. *Smith v. Empire Ins. Co.* 25 Barb. N. Y. 497. 1857.

§ 7. Where a policy, in consideration of one premium, insured separate sums on stock and on fixtures; and a subsequent insurance, without notice, was effected on the stock, in violation of the stipulations of the policy on that subject; *Held*, that the policy was avoided as to both stock and fixtures. *Kimball v. Howard Fire Ins. Co.* 8 Gray, Mass. 33. 1857.

§ 8. Where a policy was taken for separate sums on store and on stock, and but one premium note was given; and where the representation of assured that he was owner of the store turned out to be false; *Held*, that the contract was entire, and was avoided as to both store and stock. *Lovejoy v. Augusta Mut. Fire Ins. Co.* 45 Me. 472. 1858.

§ 9. Where a store and the stock of goods in it were covered by the same policy, and the whole property was represented to be unencumbered, when in fact the store was under a mortgage; *Held*, that the policy was void as to the goods as well as the store. *Gould v. York County Mut. Fire Ins. Co.* 47 Me. 403. 1859.

§ 10. A firm obtained insurance upon a storehouse and the stock of goods therein, for a separate sum. The interest of the insured in the house was incorrectly described in the policy as belonging to the firm, whereas it was the property of one of its members. In a suit brought to recover for the loss of the goods; *Held*, in the absence of proof that the plaintiffs procured the insurance upon the house for a fraudulent purpose, or that their supposed interest in the house induced the defendant to insure the goods, that the insurance on the goods was not vitiated by such mistake. *Phoenix Ins. Co. v. Lawrence*, 4 Metc. Ky. 9. 1862.

§ 11. Where a policy covering a house and furniture therein, is void as to the building, the plaintiff cannot recover thereon for loss of furniture. The contract being indivisible, is wholly void if void in part. *Barnes v. Union Mut. Fire Ins. Co.* 51 Me. 110. 1863.

See Alienation, § 18, 30, 35, 48, 49. Distance of other buildings, 6. Encumbrance, 13, 27. Limitation Clause, 10. Other Insurance, 43. Title 53. Use and Occupation, 41.

ESTOPPEL.

§ 1. Insurers are estopped from denying payment of premium, where there is an acknowledgment in the policy, unless they can show that the acknowledgment was made in error, by fraud or duress. *Michael v. Mutual Ins. Co. of Nashville*, 10 La. An. 737. 1855.

§ 2. In an action for possession, brought by an insurance company, to whom the mortgagee, on payment of his loss, had assigned the mortgage; *Held*, that the grantor of the mortgage was estopped from denying his own title. *Coneord Mut. Fire Ins. Co. v. Woodbury*, 45 Me. 447. 1858.

§ 3. Where the application is referred to as constituting part of the policy, and as being a warranty on the part of the assured, the latter after receiving the policy cannot set up that the application is not his act, though the insurance be procured through an agent and the application be unsigned. And in such a case, where the application states that there are no incumbrances, and in fact there are two mortgages, the policy is void, although at bottom of the application was a stipulation that the answers were a full, just, and true exposition of all the facts and circumstances as to the risk, so far as known to the applicant and "material to the risk." *Draper v. Charter Oak Fire Ins. Co.* 2 Allen, Mass. 569. 1861.

§ 4. Where the directors of a mutual fire insurance company are empowered by charter "to determine the sum to be insured upon any building, provided it do not exceed three-fourths of the value thereof," but are, by the general powers invested in them, to determine the value of the building, the company, when sued for a loss under a policy, is estopped from objecting that the sum insured by the directors exceeded the prescribed limit of value, there having been no fraud or misrepresentation as to value on the part of the insured. *Hoxsie v. Providence Mut. Fire Ins. Co.* 6 R. I. 517. 1860.

§ 5. An insurance company is not chargeable with notice of incumbrances on property on which it issues a policy, because such incumbrances are matters of public record, so as to be estopped from setting up such incumbrances in avoidance of the policy. *Mutual Ins. Co. v. Deale*, 18 Md. 26. 1862.

§ 6. Where an insurance company, after notice of a fire, by letter, from the insured, five or six days after it had occurred, sent an agent to investigate the loss, &c., and such agent, by authority of the company, offered to compromise the loss; *Held*, that the company had by their acts waived the objection; and were estopped from setting up the defence that notice of the loss was not sent "forthwith," as required by the policy. *Lycoming Ins. Co. v. Schreffler*, 42 Penn. St. 188. 1862.

§ 7. A policy was granted on a survey by the company's agent, without any written application, on property situate in a building the east and west walls of which were stated in the policy to be entire, and by the terms of the policy it was to be void if the building should be used for carrying on or exercising therein any trade or business denominated extra hazardous, without the agreement of the company thereto endorsed on the policy; and such policy was once renewed, a new survey being made. In an action on the policy, the defence was, that the west wall of the building was not entire, but that there were two doors through the same; and that the insured carried on in the building, at the time the loss occurred, an extra hazardous business, viz: cabinet making and upholstery manufacturing, without any agreement therefor endorsed on the policy. *Held*, that parol evidence might be given to show that at the time the risk was taken, and when the policy was renewed and surveys made, the agents of the company knew of the existence of the doors in the west wall, and that they knew that cabinet-making and upholstery manufacturing was then being carried on in the building. And it appearing that there was no fraud or misrepresentation committed by the insured, and that everything relating to the risk was done in the belief that, after the agents had visited and examined the premises, the policy would be filled up so as to make it valid between the company and the insured, and the building continuing in the same condition, and to be used for the same purposes as when the risk was taken; the defence set up

could not prevail, and the company was estopped from taking advantage of the acts of its agents done within the scope of their authority. *Beal v. Park Fire Ins. Co.* 16 Wis, 241. 1862.

§ 8. A vote by directors of a mutual insurance company, authorizing one of their number and their treasurer to settle a loss, and partial payments actually made by the treasurer upon trustee processes, in which the company were summoned as trustees of the assured, and statements by different officers of the company to the assured that his claim ought to be paid, will not estop the company from defending an action upon the policy on the ground of misrepresentations in the application for insurance, if it does not appear that the assured has changed his position in reference to his claim, in consequence of these acts and declarations. *Murphy v. People's Equitable Mut. Fire Ins. Co.* 7 Allen, Mass. 239. 1863.

§ 9. Where a policy provided that the value of the property shall be deemed what it would cost at the time of the fire to replace it; and also required the preliminary proofs to state the actual cost of the articles; *Held*, that the insured were not barred by their statement in such proofs of the actual cost, from claiming that the value, at the time of the fire, was a greater sum. *Hoffman v. Aetna Fire Ins. Co.* 1 Robert. N. Y. 501. 1836. S. C. 19 Abb. Pr. 325. Affirmed 32 N. Y. 405.

§ 10. A statement in the instructions issued by the directors of a mutual insurance company to agents, that distilleries are not insurable, does not preclude the company from making a valid contract of insurance upon a distillery. *Citizens' Mut. Fire Ins. Co. v. Sortwell*, 8 Allen, Mass. 217. 1864.

See Alienation, § 12, 69. Application, 29, 30, 40, 50. Classification of Risks, 4. Dependency of Policy and Premium Note, 4. Distance of Other Buildings, 19. Encumbrance, 22, 34. Illegality of Contract, 5. Insurable Interest, 42. Other Insurance, 25, 89, 105. Parol Evidence, 29. Preliminary Proofs, 25. Premium Notes, 5. Renewal of

EVIDENCE.

§ 1. Defendant was indicted for setting fire to her house, and to prove that the house was insured the books of the insurance office were produced, in which was an entry to that effect. *Held*, that the policy was the best evidence, and no evidence from the books could be admitted unless notice had been given to produce the policy. *Rex v. Doran*, 1 Esp. 127. 1791.

§ 2. The insurance company charged fraud in procuring an over-valuation, and introduced evidence to prove it. *Held*, that testimony of plaintiff's good character was inadmissible to rebut the proof of fraud. Such evidence, for such a purpose, is inadmissible in a civil suit. *Fowler v. Ætna Ins. Co. of N. Y.* 6 Cowen, N. Y. 675. 1827.

§ 3. Where the jury adopted the assured's estimate of loss, as given in his affidavit of loss, and there was no other evidence to show the correctness of such statement; *Held*, that there must be a new trial, and that assured must prove the loss. *Moadinger v. Mechanics' Fire Ins. Co.* 2 Hall, N. Y. 490. 1829.

§ 4. The opinions of experienced underwriters, as to whether the erection of a boiler-house adjacent to a building insured would increase the risk, are not competent testimony. It is not a matter of science or skill; and the jury must judge for themselves, from the circumstances in evidence, whether the risk was increased. *Jefferson Ins. Co. v. Cotheal*, 7 Wend. N. Y. 72. 1831. ✓

§ 5. Upon an issue whether plaintiff was interested in goods destroyed by fire, if a witness called by the plaintiff state that invoices of the goods, and letters of advice, purporting to be written by him at Edinburgh, were fabricated in London, after the fire, by plaintiff's

direction, it is competent for the plaintiff to call other witnesses to disprove the alleged fabrication and show the genuineness of the documents. *Friedlander v. London Assurance Co.* 1 Nev. & Man. 31 ; 4 Barn. & Adol. 193. 1832 (24 E. C. L. 47).

§ 6. The only question in dispute in this case was as to value of the goods destroyed, concerning which the judge held that the testimony adduced by assured, and not circumstantially contradicted by the witnesses of the company, although not so entirely explicit as might be desired, was yet sufficient to support the judgment ; which was therefore affirmed. *Gillaume v. Louisiana Ins. Co.* 6 La. 117. 1833.

§ 7. This was a policy on the stock of a hair-worker ; and the assured, to show the amount of loss, introduced in evidence a book containing an account of stock taken the month previous to the loss, and also other accounts of stock running through several years preceding. The company offered in evidence the opinions of witnesses skilled in handwriting, to show that all the accounts were written at one and the same time. *Held*, that this evidence was inadmissible. Also held, that the opinions of witnesses that others engaged in the same business had a much less stock, were inadmissible to show a fraudulent overstatement of his stock by the assured. *Phoenix Fire Ins. Co. v. Philip*, 13 Wend. N. Y. 81. 1834.

§ 8. Evidence having been given to show that the plaintiffs, after leaving Ohio, had a quantity of valuable merchandise in Kentucky, the defendant produced the records of the insolvent commissioner to show that the plaintiffs applied for and obtained a discharge under the insolvent law, after the fire. *Held*, that this evidence was admissible to show a state of things inconsistent with his situation in Kentucky, from whence to infer the fraud of the plaintiff. *Harris v. Protection Ins. Co. Wright, Ohio*, 548. 1834.

§ 9. Evidence, that buildings in Utica insured by an agent in another city, would not have been insured by the regular agent of Utica, is immaterial. *Lightbody v. North American Ins. Co.* 23 Wend. N. Y. 18. 1840.

§ 10. Parol evidence, or testimonial proof, will not be received to show that, in case of a donation of a house and lot by authentic act, it was agreed that the donor should continue to receive, and enjoy during his lifetime, the rents of the property. *Macarty v. Commercial Ins. Co.* 17 La. 365. 1841.

§ 11. Representation that the company did not and would not insure property in the city of Pittsburgh and other large cities, made by an agent only authorized to receive applications and forward them to the company, whereby assured was induced to become a member of the company, held not to be within the scope of such agent's authority, and, although false, not admissible in evidence in an action against assured by the company, for the premium note. The board of directors decided where insurance should be taken, and neither an agent nor the president had authority to bind the company by such representations. *Hackney v. Alleghany County Mut. Ins. Co.* 4 Penn. St. 185. 1846.

§ 12. Any evidence conducing to show that damage consequent upon the fire was less than that claimed, would be admissible, but the doctrine relative to mitigation of damages has no application. *Franklin Fire Ins. Co. v. Hamill*, 6 Gill, Md. 87. 1847.

§ 13. In an action on policy of insurance, where the question of value was in issue, the defendant was permitted to ask a witness, who was clerk in an adjoining store of about the same size and with a like stock, what was the amount of stock in the adjoining store, according to an inventory which had been taken, and the relative amount

of goods in each store, according to their appearance, with a view to prove that plaintiff's store contained a smaller amount of stock than had been represented by his witnesses. *Howard v. City Fire Ins. Co.* 4 Denio, N. Y. 502. 1847.

§ 14. The defendant read in evidence an affidavit of plaintiff in the preliminary proofs, for the purpose of contradicting it, and defeating the policy, by showing "fraud or false swearing." *Held*, that it was proper for the defendant to read the affidavit, but that it was not to be regarded by the jury as evidence in favor of the plaintiff of the facts asserted therein. *Howard v. City Fire Ins. Co.* 4 Denio, N. Y. 502. 1848.

§ 15. In an action for slander against an agent of an insurance company, for charging the assured with altering a policy of insurance; *Held*, that the policy was sufficiently proven to be admissible in evidence, when it had been produced, the secretary's signature proven, and a receipt from the agent for an assessment paid by the plaintiff. *Van Allen v. Bliven*, 4 Denio, N. Y. 455. 1847.

§ 16. The preliminary proofs are not admissible in evidence to the jury, on the question of the amount of damages, unless the policy has made them so. *Sexton v. Montgomery County Mut. Ins. Co.* 9 Barb. N. Y. 191. 1848.

§ 17. The affidavit and examination, under oath of assured, having been admitted without objection on the part of defendants, is competent evidence for the consideration of the jury, on the question of the amount of the loss. *Moore v. Protection Ins. Co.* 29 Me. 97. 1848.

§ 18. If conditions annexed to a policy represent one class of buildings or property as more hazardous than another, it is not competent to show that they are not so in fact. *Richards v. Protection Ins. Co.* 30 Me. 273. 1849.

§ 19. In an action upon policy of insurance, the plaintiffs sought to introduce in evidence a paper, written by the secretary of the company, giving consent to additional insurance, and proved his signature; but, it appearing that the paper had been mutilated, and a material part torn off from the bottom; *Held*, that the refusal of the judge to let it go to the jury was correct. *Tillou v. Clinton & Essex Mut. Ins. Co.* 7 Barb. N. Y. 564. 1850.

§ 20. Where defense is, that the plaintiff set fire to the building insured, evidence of his previous declarations to his lessor, inconsistent with a guilty purpose, is admissible, as part of the *res gestæ*. *Klein v. Franklin Ins. Co.* 13 Penn. St. 247. 1850.

§ 21. The defendants introduced witnesses to show that the plaintiff, in violation of a stipulation in his policy, had deposited ashes in wooden casks after the date of the policy. The plaintiff introduced witnesses to contradict this testimony, who, to a cross-interrogatory by defendants, as to whether ashes had not been thus deposited prior to the date of the policy, answered in the negative; and thereupon defendants offered testimony to show that ashes had been thus deposited prior to the date of the policy. *Held*, that this evidence, at this stage of the proceedings, could be properly offered only to contradict or impeach the witnesses called by plaintiff, and was incompetent for this purpose, as the answers drawn out by the cross-examination did not relate to matters material to the case. *Underhill v. Agawam Mut. Fire Ins. Co.* 6 Cush. Mass. 440. 1850.

§ 22. A premium note, reciting the receipt of the policy, in an action on the note, is evidence, *prima facie*, that the policy was issued. *New England Mut. Fire Ins. Co. v. Belknap*, 9 Cush. Mass. 140. 1851.

§ 23. Evidence that the agent of the insurers drew up the application, and knew of the existence of buildings,

omitted to be mentioned in such application, as standing within ten rods of property to be insured, is inadmissible. *Kennedy v. St. Lawrence County Mut. Ins. Co.* 10 Barb. N. Y. 285. 1851.

§ 24. Invoices, books of account, sales, and inventories of stock taken immediately after a fire, and the testimony of the clerks of the assured, are proper evidence of loss by removal of goods when endangered by fire. *Case v. Hartford Ins. Co.* 13 Ill. 676. 1852.

§ 25. The opinion of a witness as to value of a mill which he had never seen, and only knew of by having heard it described by others, is not admissible. *Westlake v. St. Lawrence County Mut. Ins. Co.* 14 Barb. N. Y. 206. 1852.

§ 26. The assignor is a competent witness to prove the value of the property insured, and therefore his detailed statements to the insurers of the cost of the building at the time of insurance is not admissible, he himself being present. *Westlake v. St. Lawrence County Mut. Ins. Co.* 14 Barb. N. Y. 206. 1852.

§ 27. Buildings insured were called brick buildings, but above two first stories the walls were of joists filled in with brick four inches; *Held*, that there was no error in asking a builder this question: "Would you consider these houses, and would they be called brick houses, or not?" *Mead v. Northumberland Ins. Co.* 3 Selden, N. Y. 530. 1852.

§ 28. Evidence of a practice of the company, upon the happening and payment of losses to surrender the note and cancel policy, is not admissible to vary or contradict the terms of the policy or premium note. *New Hampshire Mut. Fire Ins. Co. v. Rand*, 4 Fost. N. H. 428. 1852. *Swamscot Machine Co. v. Partridge*, 5 Fost. N. H. 369. 1852.

§ 29. It is not competent for the underwriter to introduce evidence to show that the actual value of the property insured is less than the amount stated in a valued policy, except for the purpose of showing fraud in the assured. *Cushman v. North Western Ins. Co.* 34 Me. 487. 1852.

§ 30. Where the plaintiff had introduced evidence to show that the president and secretary of the company, when consenting to the assignment of the policy to him, knew that the property had been sold and transferred to him, and that a new deposit note had been given to an agent of the company only authorized to receive and forward applications; *Held*, that the testimony of the president and secretary, that they had no such knowledge, was admissible as rebutting testimony. *Fogg v. Middlesex Mut. Ins. Co.* 10 Cush. Mass. 347. 1852.

§ 31. The policy in controversy was on a stock of goods. At time this policy was made, another policy, in favor of the same party, was made on the building in which the stock was kept. *Held*, that a copy of this last policy, with the indorsements thereon, the original being lost, was admissible in evidence, if it had any bearing upon the other, and its weight was for the jury. *Fogg v. Middlesex Mut. Ins. Co.* 10 Cush. Mass. 337. 1852.

§ 32. It is not error to ask witness, who was an experienced and practical fireman, whether in his opinion the risk from fire was increased by certain alterations in a building; for such purpose he is an expert. *Schenck v. Mercer County Mut. Ins. Co.* 4 Zab. N. J. 447. 1853.

§ 33. Opinions are only admissible where the nature of the inquiry involves a question of science or art, or of professional or mechanical skill, and then only from witnesses skilled in the particular business to which the question relates. *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. (22 Ohio), 452. 1853.

§ 34. The opinions of witnesses engaged in the insurance business, as to the materiality of the fact that the building insured had shortly before been on fire, and the effect it would have upon the mind of a prudent underwriter, if communicated, are not admissible in evidence. *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. (22 Ohio) 452. 1853.

§ 35. An offer to sell, is evidence, at least, against the person offering, that the property was not worth more. *Hersey v. Merrimack County Mut. Fire Ins. Co.* 7 Fost. N. H. 149. 1853.

§ 36. Where the building insured is described in the policy as "occupied as a storehouse," it is a warranty that the building is occupied as a storehouse only. The ordinary signification of the word, "storehouse," can not be changed by evidence of a usage in a different sense, reaching back but a few weeks, nor by evidence that all parties to the policy knew the building was not exclusively occupied for storing. It cannot be inferred from such evidence that the word was used in a different sense from the ordinary meaning. *Wall v. East River Ins. Co.* 3 Duer, 264. 1854.

§ 37. The rates of hazards, instructions to their agents, or the by-laws of the company, are not evidence on the part of the company, it not appearing that the adverse parties had been informed of their terms. Evidence is admissible of the testimony of a witness before arbitrators in the same case, he being at a distance out of the State, being unmarried, and having never had a permanent residence in the State. *Insurance Co. v. Johnson*, 23 Penn. St. 72. 1854.

§ 38. Where a general assignment for the benefit of creditors has been made, the assignor is rendered a competent witness in a suit by the assignee on a policy of in-

insurance. Nor is any notice of the intention of the plaintiffs to examine the assignor as a witness, necessary. Nor is it error to allow the assignor to state the purpose for which the securities were given to the plaintiff. *Allen v. Hudson River Mut. Ins. Co.* 19 Barb. N. Y. 442. 1854.

§ 39. A letter from secretary of the company, to assured, acknowledging the receipt of preliminary proofs and notice of loss, and admitting the sufficiency thereof, is sufficient evidence of the time when they were given to, and received by the company. *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 20. 1855.

§ 40. In a suit on a policy on machinery, the testimony of one, who had owned it, and sold it to the plaintiff who was familiar with such machinery, having had it repaired, estimates made for other machinery of a similar kind, &c., is admissible on a question as to the value of the machinery destroyed. *Haskins v. Hamilton Mut. Ins. Co.* 5 Gray, Mass. 432. 1855.

§ 41. In an action on a premium note, the note itself makes out a *prima facie* case of compliance with the requisitions of statutes in regard to insurance companies. *Williams v. Cheney*, 3 Gray, Mass. 215. 1855.

§ 42. The answers of the plaintiff to interrogatories filed in another suit, are competent evidence, as admissions, against him. *Williams v. Cheney*, 3 Gray, Mass. 215. 1855.

§ 43. The production of a premium note to an insurance company is *prima facie* evidence, in a suit on the note against the maker, that the corporation was duly organized, and had capacity to make and enforce the contract declared on. *Williams v. Cheney*, 3 Gray, Mass. 215. 1855.

§ 44. Evidence was given of a vote of the directors authorizing the secretary to assign securities to a given amount, and the secretary made assignments accordingly ; and afterward, without further authority, he assigned other securities, the note in suit among others, and substituted them for a part of those before assigned. There was evidence that the secretary had never before assigned notes to be held as collaterals, but had frequently assigned them for purposes of discount. *Held*, that this evidence should go to the jury ; and from it they might decide whether there was authority to assign the note in question. *Williams v. Cheney*, 3 Gray, Mass. 215. 1855.

§ 45. W. brought a suit to recover on a lost policy of insurance ; on the trial he was sworn to prove the loss of the policy ; he testified that the policy had never come to his hands, that he had never received it, that he had searched for it among his papers, and that he had no such paper in his custody or under his control. *Held*, that the proof was sufficient to establish the loss of the policy. *Sussex County Mut. Ins. Co. v. Woodruff*, 2 Dutch. N. J. 241. 1856.

§ 46. An application for insurance was dated August 1st, 1854, and it therein appeared that the insurance was for five years ; the amount of the premium paid and deposit note was sufficiently large to cover an insurance for that term ; and on the back of the policy was stated that the policy expired August 1st, 1859 ; but in the body of the policy, it was expressed to be from 1st of August, 1854, to August 1st, 1854. *Held*, that other parts of the contract were admissible in evidence to correct what was evidently a clerical error. *Liberty Hall Association v. Housatonic Mut. Fire Ins. Co.* 7 Gray, Mass. 261. 1856.

§ 47. Proof that notices to all parties assessed were made and deposited in the post office by the secretary and treasurer, and that a member, when afterwards called upon,

refused to pay on other grounds than want of notice, is sufficient evidence of notice of assessment to go to the jury. *Jones v. Sisson*, 6 Gray, Mass. 288. 1855.

§ 48. When a member of a firm describes the property as "his own," and in affidavit in preliminary proofs states he is the principal member of a firm, that he furnished all the capital, &c.; the other partner is competent to testify that, although ostensibly a partner, he yet practically had no interest whatever in the policy. *Irving v. Excelsior Fire Ins. Co.* 1 Bosw. N. Y. 507. 1857.

§ 49. In an action on policy of insurance against fire on "books, type, plates, &c., with the privilege of printing and book bindery," one condition of which excepts "any loss occasioned by the use of camphene;" evidence of a usage in similar printing establishments to use camphene for the purpose of cleaning type and rollers is admissible. *Harper v. City Ins. Co.* 1 Bosw. N. Y. 520. 1857.

§ 50. Under an answer stating that after making the survey and before the fire, the assured removed the force pump, the defendant is not compelled to prove this precise allegation, but may show that there was no force pump in the distillery, the legal effect of which is to prove the allegation in his answer, that the pump had been removed. The provisions also of the code in New York, held sufficiently broad, to enable the defendant to give the proposed evidence in respect to the pump. *McComber v. Granite Ins. Co.* 15 N. Y. 495. 1857.

§ 51. Evidence, that three weeks before the fire occurred, there was a quantity of straw lying on the floor of one of the buildings insured; and that some boys had made a bonfire of the same, in the alley, with a trail of straw leading to the building, is inadmissible. *White v. Mutual Fire Assurance Co.* 8 Gray, Mass. 566. 1857.

§ 52. When the value of property at the time of fire is put in issue by the pleadings, evidence of such value is relevant at the trial; nor is evidence of the rent of the building insured too remotely circumstantial. *Cumberland Valley Mut. Protection Co. v. Schell*, 29 Penn. St. 31. 1857.

§ 53. Evidence tending to show that a policy was to take effect at some other time than at its date, is not liable to objection as varying a written contract, and is admissible. *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328. 1857.

§ 54. Where a policy is produced, to which printed by-laws are attached, and they are referred to in the policy, and made a part of it, the same evidence which proves the policy proves the by-laws. *Atlantic Fire Ins. Co. v. Sanders*, 36 N. H. 252. 1858.

§ 55. Testimony of an insurance expert, as to whether the premium of insurance would be increased in consequence of the owner vacating a dwelling house, is incompetent. *Joyce v. Maine Ins. Co.* 45 Me. 168. 1858.

§ 56. The president and secretary of an insurance company, not being stockholders therein, are competent witnesses for the company in an action upon a policy executed by the company. *National Fire Ins. Co. v. Crane*, 16 Md. 260. 1860.

§ 57. The policies and applications described the property insured as the property of the plaintiffs, but on the trial of the cause, offered no evidence of their title to the property. *Held*, that in mutual insurance, the representations of the assured in respect to title, stand upon the same ground with other representations, and the legal presumption is that they are true until they are proven false. *Nichols v. Fayette Mut. Ins. Co.* 1 Allen, Mass. 63. 1861.

§ 58. The affidavits and accounts of loss, constituting the preliminary proofs, are evidence that the plaintiff has complied with the requirements of the policy in this respect, but are not evidence in his favor upon the amount of the loss. *Newmark v. London & Liverpool Fire & Life Ins. Co.* 30 Mo. 160. 1860.

§ 59. The opinions of witnesses, who had no knowledge of the store and its contents before the fire, as to the amount of goods in value which the plaintiff's store would contain, and especially the value of the goods which could have been packed on the shelves, are not admissible in evidence. *Newmark v. London & Liverpool Fire & Life Ins. Co.* 30 Mo. 160. 1860.

§ 60. This action was on a policy, insuring a stock of goods. The defense was, that assured had fraudulently over-stated and over-valued the amount of goods lost, in his preliminary proofs. *Held*, that evidence as to value of the building, insured in another company, was not competent on the question as to the value of goods. But the judge before whom the case was tried, having admitted such evidence, contrary to the objection of defendant; *Held*, that defendant might introduce rebutting testimony as to the value of the building containing the goods insured. *Ward v. Washington Ins. Co.* 6 Bosw. N. Y. 229. 1860.

§ 61. Underwriters will not be permitted to express their opinions as to the nature of a risk, whether it is more or less hazardous; like other witnesses, they can only testify to facts. They do not come within the rule, that experts may testify in particular cases, and that permits men of professional science to give their opinion upon subjects connected with the arts. *Merchants & Man. Mut. Ins. Co. v. Washington Mut. Ins. Co.* 1 Hand. Ohio, 408. 1855.

§ 62. In an action upon an insurance policy, the preliminary proofs furnished by the assured to the insurance company, are admissible for the purpose of showing a compliance with a condition of the policy; and if the defendant desires to limit the effect of the evidence, he should not object generally to its admission, but should state distinctly the ground of his objection, and then, if proper instructions on the subject are not given to the jury, the error will be corrected on appeal. *Bonner v. Home Ins. Co.* 13 Wis. 677. 1861.

§ 63. A statement of loss made out by an insured person, under oath, as required by the policy of insurance, is not evidence as to the extent or amount of the loss, in an action against the insurers, nor is it made evidence by the fact that it is called for by the defendants. *Lycoming Ins. Co. v. Schreffler*, 42 Penn. St. 188. 1862.

§ 64. Though the insurer does not object to the regularity of the preliminary proofs, yet the insured cannot prove his loss or the particulars of it by them. He cannot make evidence for himself. *Commonwealth Ins. Co. v. Sennett*, 41 Penn. St. 161. 1862.

• § 65. It is competent to prove by the testimony of a witness, that he forwarded a notice of the loss by fire to the company, and to read to the jury a copy of that notice, retained at the time, without having first notified the company to produce the notice. *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352. 1862.

§ 66. Where a condition of a policy of insurance requires the insured to deliver an account of their loss, with their oath or affirmation declaring the account to be true and just, &c., the affidavit of the insured is admissible to prove a compliance with such condition, but for no other purpose. *Phoenix Ins. Co. v. Lawrence*, 4 Metc. Ky. 9. 1862.

§ 67. In an action by the receiver of an insurance company upon a premium note, as between the company and one of its members, the existence of the corporation is to be deemed sufficiently established. *Hyatt v. Whipple*, 37 Barb. N. Y. 595. 1862.

§ 68. Where a building was originally constructed, and several times used for the purposes of an exhibition of industry or fair, and the defendants, knowing its use, had several times insured its owners in respect to it, and the plaintiffs, subsequently becoming its owners, procured the defendants to insure them in respect to it; *Held*, that, in an action upon the policy issued to the plaintiff, evidence of the former insurances was admissible as tending to show, in connection with other facts, that the defendants were aware of the general purposes for which the building was used, and designed to assume a risk of the same character. *Mayor &c. of New York v. Exchange Fire Ins. Co.* 9 Bosw. N. Y. 425. 1862.

§ 69. The report of loss made out by the agent of the company is not evidence to go to the jury, as to the amount of loss, in an action upon the policy, though accompanied by the affidavit of the party insured. *Lycoming County Mut. Ins. Co. v. Schreffler*, 44 Penn. St. 269. 1863.

§ 70. The record of proceedings in equity, in another State, under which the legal title to real estate was decreed to the equitable owner, is admissible in an action on an insurance policy as evidence of the existence of an insurable interest in the party insured at the date of the policy, although the proceedings were not commenced until after the loss had occurred on which the action was founded. *Coursin v. Pennsylvania Ins. Co.* 46 Penn. St. 323. 1863.

§ 71. A witness, in an action on a policy of insurance, cannot be allowed to testify what is meant by a *per-*

maiment policy; it not appearing to be a term of art, or one employed in any particular business. *Baptist Church v. Brooklyn Fire Ins. Co.* 28 N. Y. 153. 1863.

§ 72. An admission by the secretary of an insurance company, after a loss had occurred, that the property destroyed was insured at the time of the fire, made to a third person, is not competent as principal evidence against the company. *Baptist Church v. Brooklyn Fire Ins. Co.* 28 N. Y. 153. 1863.

§ 73. In determining the question whether an insurer positively undertook to insure or stated that he would see about it, the jury are authorized to consider the probability of the applicants being satisfied with the latter answer. *Audubon v. Excelsior Ins. Co.* 27 N. Y. 216. 1863.

§ 74. Where a party states in his application for insurance that he is the owner of the property, by virtue of an article of agreement with another, he cannot be allowed to show, in an action on the policy, that at the time of making the application, he told the agent of the insurer, that he owned the building, having purchased it before he took the contract for the land; it being an offer to contradict the written application, by parol. *Birmingham v. Empire Ins. Co.* 42 Barb. N. Y. 457. 1864.

§ 75. Where by the by-laws of a mutual insurance company, it is made the duty of its secretary to keep a record of the doings of the directors and of the company, as well as to receive notice of a loss; his letters addressed to the assured, so far as they admit a notice of the loss, or communicate the doings of the directors thereon, are admissible in an action upon the policy. *Lewis v. Monmouth Mut. Fire Ins. Co.* 52 Me. 492. 1864.

§ 76. In an indictment for arson, alleged to have been committed with intent to defraud an insurance company, it is sufficient to prove the existence of the corporation *de facto*. *People v. Hughes*, 29 Cal. 257. 1865.

§ 77. Evidence that the agent of an insurance company frequently waived the conditions of its policies requiring prepayment of premiums, is not admissible to raise an inference of waiver in a particular case in the absence of other proof tending to establish such waiver. *Wood v. Poughkeepsie Mut. Ins. Co.* 32 N. Y. 619. 1865.

§ 78. In an action for loss by fire of a brewery and its contents where the plaintiffs carried on distilling, evidence that they had taken no license from the government; that they had insured in other companies as brewers without disclosing that they were distillers, and that they had made false representations to other companies, and of the classification of risks and rates in other companies, is irrelevant. *People's Ins. Co. v. Spencer*, 53 Penn. St. 353. 1866.

§ 79. A witness familiar with the mode of using benzole in patent leather factories in a particular place may be permitted to testify as to such use; as pertinent to the question whether the plaintiff's use of that article in his own factory had been according to the customary mode in such factories. *Citizens' Ins. Co. v. McLaughlin*, 53 Penn. St. 485. 1866.

§ 80. A witness who has been many years an officer of an insurance company, and has become acquainted with the business of fire insurance, is competent to give his opinion as to the effect produced by the erection of additions to the buildings insured. *Kern v. South St. Louis Mut. Ins. Co.* 40 Mo. 19. 1867.

See Parol Evidence, Burning by Design, and Burden of Proof; also, Agent, § 10, 12, 40, 48. Alienation, 41. Application, 9, 18, 20. Assignment, 10. Books of Account and Vouchers, 6. Certificate, 3. Consummation of Contract, 11, 13. Damages, 10, 12. False Swearing, 4, 6. Foreign Insurance Companies, 10, 17. Increase of Risk, 20. Insurable Interest, 28. Interest in Policy, 27. Negligence, 6. Other Insurance, 9, 47, 68. Parol Contract, 2, 7. Payment of Premium, 3, 7. Pleading and Practice, 83. Preliminary Proofs, 16, 23. Premium Notes, 17, 32. Rebuild, Repair or Replace, 3. Reform of Policy, 2, 5, 7. Responsibility of Assignee for Acts of Assignor, 8. Storing or Keeping, 12. Title, 8, 43. Usage, 7, 8, 10. What Property is Covered by Policy, 22, 23. Who May Sue, 27. Written Portion of Policy, 7.

EXAMINATION UNDER OATH.

§ 1. The condition requiring assured to "submit to an examination under oath;" *Held*, to have been complied with after submitting to one examination, although he refused to answer under oath questions asked subsequently. *Moore v. Protection Ins. Co.* 29 Me. 97. 1848.

§ 2. Where policy required protection of "vouchers, and an examination under oath," and assured fails to comply with such requisition without excuse or justification, he cannot recover; but his failure is to some extent a question of fact and intention. If it was to gain time and lessen the chances of detecting fraud, it would be fatal; but if to save the assured or his family from an epidemic, it would not. *Phillips v. Protection Ins. Co.* 14 Mo. 220. 1851.

§ 3. It was stipulated in an insurance policy, that the insured should, if required, submit to an examination, under oath, by the agent of the company, and answer all questions, &c., and subscribe such examination when reduced to writing, and until examination, being required, was had, the loss should not be payable. In an action

upon the policy, it appeared that such an examination, being required, had been in part had, and reduced to writing, but not subscribed, and, without objection from the insured, was adjourned for two or three weeks, when it was to be completed; but that when applied to for that purpose by the agent, within the time limited, the insured refused to submit to a further examination, or to subscribe that already taken. *Held*, that such refusal, under the circumstances of the case, was unwarranted, and therefore, by the terms of the policy, the loss had not yet become payable. *Bonner v. Home Ins. Co.* 13 Wis. 677. 1861.

EXECUTIONS.

§ 1. The charter provided "that execution shall not issue on any judgment against said company, until after the expiration of three months from the rendition thereof." *Held*, that the provision was binding; and execution was ordered staid for three months, although a judgment on the same claim had been rendered before in another State. *Judkins v. Union Mut. Fire Ins. Co.* 39 N. H. 172. 1859.

§ 2. The charter of this, which was a mutual company, provided for a division of the risks into several classes, and further provided that the premium notes in each class should only be liable for assessments on losses appertaining to that class. Execution was restricted to run only against the funds and property of the defendant corporation belonging to the class to which the note, on which judgment had been rendered, belonged. *Judkins v. Union Mut. Fire Ins. Co.* 39 N. H. 172. 1859.

FALSE SWEARING.

§ 1. By the term "false swearing," as used in the conditions of the policy, the jury were instructed was meant an attempt to defraud the company, by swearing intentionally, and with bad motives, to the existence of property which the insured had never lost, or by greatly overcharging that which was destroyed, or not acknowledging that which had been saved. *Moadinger v. Mechanics' Fire Ins. Co.* 2 Hall, N. Y. 490. 1829.

§ 2. Condition that if there appear fraud in the claim, or fraud or false swearing or affirming in support thereof, the claimant shall forfeit all benefit under the policy. The insured swore his loss at £1,085. The jury returned verdict in his favor of £500. Rule *nisi* for new trial obtained on the ground that the finding of £500 damages, instead of the amount sworn, was in effect a verdict for defendants under the said condition. Rule made absolute. *Levy v. Baillie*, 7 Bing. 349 (20 E. C. L. 160). 1831. Same case, 5 Moore & Payne, 208. 1831.

§ 3. If statement of loss sworn to by claimant, is disproved by witnesses, he is precluded on that ground from recovering on the policy. *Regnier v. Louisiana State Marine & Fire Ins. Co.* 12 La. 336. 1838.

§ 4. Under a policy of insurance which provided that if there should be any false swearing on the part of the assured, he should forfeit all claim to the policy, a failure by the latter to sustain his affidavit by direct evidence to the amount claimed, will not be considered as proof of having sworn falsely, and thereby forfeit the insurance. In open policies it is often extremely difficult to prove the actual value of the goods lost; it suffices to show by

testimony the great probability of the truth of the affidavit; and, in weighing this testimony the character of the assured as well as the credibility of the witness, must be considered. *Marchesseau v. Merchants' Ins. Co.* 1 Rob. La. 438. 1842. *Wightman v. Western Marine & Fire Ins. Co.* 8 Rob. La. 442. 1844.

§ 5. When an agent, by whom insurance had been effected, he being named as agent in the policy, swears to the loss as his, the oath will be considered as referring to the character in which he was recognized, and acted when he effected it, and not as proof of perjury. *Henderson v. Western Marine & Fire Ins. Co.* 10 Rob. La. 164. 1845.

§ 6. In an action on a policy of insurance effected on account of the plaintiff by an agent, in agent's own name, the record of a suit between the agent and the same insurer, on agent's own policy, will not be admissible to prove fraud and false swearing on the part of the plaintiff in the latter suit, or to show what portion of the property insured belonged to the plaintiff in the action in which it is offered in evidence. The fraud and false swearing on the part of the agent, being in his own case, and for his own purpose, was irrelevant; and the principals not being party to the suit, the matter cannot be used against them. *Henderson v. Western Marine & Fire Ins. Co.* 10 Rob. La. 164. 1845.

§ 7. Where in an action on a policy of fire insurance, providing for a "forfeiture of all claims under it in case of false swearing on the part of assured," there is a difference between the amount of the loss sworn to by the insured, in his affidavit, and the amount proven on the trial, such difference is not conclusive evidence of fraud and "false swearing;" but the burden of proving that the difference was the result of error and not of an intention to defraud, is on the plaintiff, and, in the absence of any satisfactory explanation, it must be considered as

imposing upon the assured forfeiture of all claims under the policy. *Hoffman v. Western Marine Fire Ins. Co.* 1 La. An. 216. 1846.

§ 8. Where assured's affidavit of loss claimed damage to the amount of \$2,800, and the jury brought in a verdict for only \$1,850; *Held*, not to be evidence of such fraud or "false swearing" as to justify a new trial where the jury had been instructed to find for the defendant, if they should find that there had been any "false swearing" on the part of the assured. *Moore v. Protection Ins. Co.* 29 Me. 97. 1848.

§ 9. No false swearing by the assured in relation to the extent of his loss, should be allowed to defeat a recovery under a condition "that any false swearing should forfeit all claims under the policy," unless it be intentionally false. The mere fact, therefore, that the amount of the loss, as found by the jury, was less than the amount claimed to have been lost by assured in his preliminary proofs, does not sustain a charge of "false swearing." *Franklin Ins. Co. v. Culver*, 6 Ind. 137. 1865.

§ 10. In the sixth plea, the defendants set up as a defense, that after the fire, the plaintiff, in making his claim, had misrepresented and over-stated the amount of his loss, contrary to the form and effect of the condition in the policy. *Held*, that to sustain this plea, it was necessary to prove that the over-estimate did not arise from mistake or inadvertence, but was made designedly, for the purpose of obtaining a larger sum than the loss really sustained, or to prevent close inquiry. *Held*, also, that upon the evidence set out below—it being probable that the loss, though over-estimated, was equal to the sum insured, and there being circumstances which might explain the overcharge—the jury were warranted in finding for the plaintiff. *Park v. Phoenix Ins. Co.* 19 Upper Canada, Q. B. 110. 1859.

§ 11. To create a forfeiture under a clause in a policy declaring that all false swearing or fraud, shall cause a forfeiture of all claims against the insurers, the false swearing must be done wilfully and knowingly with a view to defraud the company. *Franklin Fire Ins. Co. v. Updegraff*, 43 Penn. St. 350. 1862.

§ 12. Where a policy provides that the insured in case of loss shall deliver to the insurer a particular statement of such loss verified by his affidavit, and that any fraud or false swearing in respect thereto should forfeit all claim under the policy, a false statement, to operate as a forfeiture, must be wilfully made with respect to a material matter and with the intent to deceive the insurer. *Marion v. Great Republic Ins. Co.* 35 Mo. 148. 1864.

FLOATING POLICY.

§ 1. "Twenty thousand dollars on cotton that might be stored in seven different places." Cotton to the amount of \$17,000, was burned at one place, and, at the same time, cotton belonging to assured was stored in other places, making in all more than \$20,000. *Held*, that assured was entitled to recover the full sum lost, and not an average sum, proportioned to the sum insured as compared with the whole property at risk. *Nicolet v. Insurance Co.* 3 La. 371. 1831.

§ 2. Insurance was effected on plaintiff's house, \$1,200; furniture therein, \$250; on his barns, \$250; on his barn and shed on the meadow, \$250; and on his hay and grain therein, \$400. Hay and grain in the barn on the meadow was consumed by fire to an amount exceeding \$400. *Held*, that plaintiff was entitled to recover to the amount of \$400; no matter whether the policy be con-

structed to cover hay and grain in all the buildings, or only the hay and grain in the barn on the meadow. Supposing the insurance to cover the hay and grain in all the buildings, there is no principle of construction by which the sum insured on all the hay and grain can be apportioned to the different parcels, so that no greater sum can be recovered for the loss in this case, than a sum that shall bear the same ratio to \$400, as the value of the hay and grain in the barn on the meadow bears to the value of all the hay and grain in all the buildings named. *Rix v. Mutual Ins. Co.* 20 N. H. 198. 1849.

FOREIGN INSURANCE COMPANIES.

§ 1. The fact that an agency fails to file a statement, as required by an act, in Missouri, to license and regulate agencies of foreign insurance companies, does not avoid promises made to the company to pay the premium on insurance. *Clark v. Middleton*, 19 Mo. 53. 1853.

§ 2. The failure of an agency of a foreign insurance company to take out a license, or to furnish the clerk of the county court with certain documents, as required by law, does not make the policy void, nor disable the company to maintain or defend an action. *Columbus Ins. Co. v. Walsh*, 18 Mo. 229. 1853. .

§ 3. The law of Illinois requiring certain things to be done by agents of foreign insurance companies, and a percentage of tax to be paid to the clerk, is a burden upon agents for the right of exercising a franchise or privilege—not a tax upon property—and is not an infringement upon any of the provisions of the constitution. *The People v. Thurber*, 13 Ill. 554. 1852.

§ 4. Laws of Ohio requiring that the agent of foreign insurance companies, making contracts of insurance in that State, should also be agent to receive notice of suits, are valid and reasonable; and a judgment, obtained after service upon the agent, is entitled to full respect in other States, as a judgment against the company. *Lafayette Ins. Co. v. French*, 18 How. U. S. 404. 1855. Affirming 5 McLean, C. C. U. S. 461. 1853.

§ 5. By the 3d section of the act of March 21, 1849, in Pennsylvania, it is provided, that "in the commencement of any suit or action against a foreign insurance corporation, process may be served upon any officer, agent, or engineer of such corporation, either personally or by copy, or by leaving a certified copy at the office, depot, or usual place of business of said corporation; and such service shall be good and valid in law, to all intents and purposes." In an action against a foreign insurance company the sheriff's return to the writ was as follows: "Aug. 2, 1852. Served a true and attested copy of the within writ personally on Alfred Edwards, an agent of the within named defendants, and made known to him the contents thereof." A rule was taken to set aside the service of the writ, and depositions taken under it showing that Mr. Edwards had never taken out a license as agent, had never acted as defendant's agent in Philadelphia, and had no place of business in that place, though it was admitted that he was director of the defendant company, and their agent in New York; *Held*, that the parties were concluded by the sheriff's return, and the rule was discharged. *Patton v. Insurance Co.* 1 Philadelphia, Pa. 396. 1852.

§ 6. The provisions of Revised Statutes, Chapter 37, Section 42, as modified by Statutes of 1847, Chapter 273, Section 2, of Massachusetts, in regard to foreign insurance companies, do not apply to insurance companies, organized and doing business on the mutual principle. *Williams v. Cheney*, 3 Gray, Mass. 215. 1855.

§ 7. It is, in Massachusetts, essential to the validity of a contract of insurance with a foreign company, that the company should have previously complied with the provisions of the statutes relating to such companies; and no action can be maintained by such companies on a premium note without proof of such compliance. *Jones v. Smith*, 3 Gray, Mass. 500. 1855.

§ 8. In an action on insurance policies, issued in Upper Canada, service in Montreal, at the defendants' agency there, of process against an insurance company incorporated and having its chief place of business in Upper Canada, is not sufficient; the agent, on whom process was served, not having charge of an office belonging to the company for the transaction of its business generally, and without limitation. *McPherson v. St. Lawrence Ins. Co.* 5 Lower Canada, S. C. Montreal, 403. 1855.

§ 9. A foreign insurance company, doing business in New Orleans through an agent, cannot be permitted to frustrate a claim in Louisiana upon a contract made with it, by revoking the power of its agent on the eve of the institution of a suit, for a loss of which it has been notified. *Michael v. Mutual Ins. Co. of Nashville*, 10 La. An. 737. 1855.

§ 10. Under Chapter 453, Statutes of 1854, of Massachusetts, contracts with foreign insurance companies are valid, though there has been no compliance with the requirements of Revised Statutes, Chapter 37, and Statutes 1847, Chapter 273. *Williams v. Cheney*, 3 Gray, Mass. 215. 1855.

§ 11. Provision in charter of foreign mutual insurance company, that on failure to pay assessments the whole note may be collected, to be returned at expiration of policy, after deducting losses and expenses, not a penal statute and may be enforced. *Jones v. Sisson*, 6 Gray, Mass. 288. 1856.

§ 12. Insurance companies incorporated in one State, are legally competent to negotiate and enter into contracts in other States. *Kennebec County v. Augusta Ins. & Banking Co.* 6 Gray, Mass. 204. 1856.

§ 13. The statement proved in this case was held a sufficient compliance with Statutes of Massachusetts, 1847, Chapter 273, Section 3. *Atlantic Mut. Fire Ins. Co. v. Conklin*, 6 Gray, Mass. 73. 1856.

§ 14. A statement from a foreign mutual insurance company setting forth the whole amount of risks insured; the whole amount of premium thereon; the portion thereof paid in cash; the largest sum insured on any one risk; and the security taken for premiums not paid in cash, being the lien created by section 7 of the act incorporating the plaintiffs, is a full compliance with the requirements of the Revised Statutes, Chapter 37, Section 42, of Massachusetts. The provision of such statutes prohibiting foreign insurance companies from issuing, in any one risk, to an amount greater than one-tenth of their capital, is not applicable to mutual insurance companies. *Atlantic Mut. Fire Ins. Co. v. Conklin*, 6 Gray, Mass. 73. 1866.

§ 15. Statement in compliance with the law, filed prior to contract with defendant, is at least sufficient for him. *Atlantic Mut. Fire Ins. Co. v. Conklin*, 6 Gray, Mass. 73. 1856.

§ 16. Omission of agent to file and publish statement as required by Revised Statutes, Chapter 37, Section 41, and Statute 1847, Chapter 273, in Massachusetts, will defeat an action on deposit note. There must be a compliance before there can be a valid contract of insurance. *Washington County Mut. Ins. Co. v. Dawes*, 6 Gray, Mass. 376. 1856.

§ 17. If a premium note to a foreign insurance company, which is void for non-compliance with the statutes of Massachusetts, be assigned to a party who has knowledge that it was taken for premium on a policy by an agent in that State, the endorsee is entitled to recover, unless he knew, or had reasonable cause to know, that the note was given in violation of the statute; and whether there was such knowledge, or reasonable cause, is a question for the jury. *Williams v. Cheney*, 8 Gray, Mass. 206. 1857.

§ 18. A contract of insurance, made with an agency of a foreign insurance company that has not complied with the Statute of Massachusetts in regard to filing certain statements, and the premium note, are void, though the contract be with one who had himself no interest in the property insured, and who acted merely as agent of the owner in another State, and the policy was expressed to be "for the benefit of whom it may concern." *Williams v. Cheney*, 8 Gray, Mass. 206. 1857.

§ 19. An insurance company of another State may lawfully send a surveyor to receive applications for insurance in the State of Pennsylvania; and a premium note, made and delivered to such surveyor, is valid, and may be enforced against the maker. The remedy on such note, if sued upon in Pennsylvania, is governed by Pennsylvania laws, and not by those of the State where the company is located. That suit was brought on the premium notes without the notice required by the charter having been first given to the maker, can only be pleaded in abatement. *Thornton v. Western Reserve Farmers' Ins. Co.* 31 Penn. St. 529. 1858. See also same case in 1 Grant, Pa. 472. 1858.

§ 20. The Revised Statutes, Chapter 37, Section 40, of Massachusetts, held to apply to foreign mutual insurance companies; and action on premium note could not be maintained unless they had complied. *General Mut. Ins. Co. v. Phillips*, 13 Gray, Mass. 90. 1859.

§ 21. The legislature has the right to provide, that foreign insurance companies may be burthened for the benefit of the Chicago Benevolent Firemen's Association; and that the revenue resulting from such burthens, need not be paid into the State Treasury. *Firemen's Benevolent Association v. Lounsberry*, 21 Ill. 511. 1859.

§ 22. The facts, that the president of a foreign insurance company was at the office of the agent in Boston, soliciting business; that the defendants were invited by the agent to go there and meet him; that the application for insurance was made by the defendants to the agent, and that he suggested the company with which it should be effected; that he had the sign bearing the name of the company put up in his office; that he informed the applicants what the rates of insurance would be; that he received and forwarded applications, and received and returned policies; that he was paid for all his services by the company; and that the notes for the premium were sent to him in blank, and filled up and executed in his office, when the policies were delivered, will authorize a jury to infer that he is not a mere agent to receive and forward papers, but was an agent to solicit, procure and transact business for the company, within the provisions of Statutes of Massachusetts, 1856, Chapter 252. *Roche v. Ladd*, 1 Allen, Mass. 436. 1861.

§ 23. A foreign insurance company, that has not complied with the statute of the State, in reference to things to be done by such companies, before they can transact the business of insurance in such State, cannot maintain an action on a note given for insurance. *Ætna Ins. Co. v. Harvey*, 11 Wis. 394. 1860.

§ 24. The statutes of Massachusetts required the agents of foreign insurance companies to file with the treasurer and to publish a certain statement. A foreign company was defeated in an action for assessments on the premium note, 1st, because of variance between the statement as

filed with the treasurer and as published; 2d, because it was not signed and sworn to as required by the statute and did not state the whole amount insured by the company. *Washington County Mut. Ins. Co. v. Hastings*, 2 Allen, Mass. 398. 1861.

§ 25. Pennsylvania act of May 7, 1857, requiring the agencies of foreign insurance companies in Philadelphia to pay a percentage of their receipts to an association for the relief of disabled firemen, deemed of such doubtful constitutional validity and so extraordinary in its terms, that the court declined to enforce bonds given for the payment of such percentage—See, *Philadelphia Association &c. v. Wood*, 39 Penn. St. 73. 1861.

§ 26. A contract of insurance made with a party resident in New Hampshire, and upon property situated in that State, by a Massachusetts mutual insurance company, which had not complied, in New Hampshire, with the obligations and requirements imposed by the laws of Massachusetts upon the like corporations chartered by the laws of New Hampshire and acting in that State, is invalid under the statutes of New Hampshire. *Haverhill Ins. Co. v. Prescott*, 42 N. H. 547. 1861.

§ 27. The legislature of Wisconsin has power to permit or to prohibit the doing of business in that State, by foreign insurance companies; and may couple a permit to do business there with such conditions and restrictions as it sees fit to impose. *Fire Department of Milwaukee v. Helfenstein*, 16 Wis. 137. 1862.

§ 28. A policy of insurance negotiated in Indiana by a foreign insurance company or its agent, without a previous compliance with the act of the legislature of that State of June 17, 1852, is void. *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520. 1863.

§ 29. An insurance company doing business in New York under and in compliance with its laws, though created by the laws of another State and having its principal place of business in another State, on being sued by a citizen of New York in a court of that State, cannot remove the cause into the Circuit Court of the United States on the ground that it is a citizen of another State. *Stevens v. Phoenix Ins. Co.* 24 How. N. Y. 517. 1863.

§ 30. In a complaint on a fire policy issued by a foreign insurance company, it is not necessary to allege that the defendant had complied with the statute (of Wisconsin) requiring such companies to file certain statements under oath with the secretary of state, and obtain his certificate of authority to transact business before issuing any policies. *Fitzsimmons v. City Fire Ins. Co.* 18 Wis. 234. 1864.

§ 31. A foreign mutual insurance company which has issued a policy to a citizen of Massachusetts, and laid an assessment thereon, without first appointing a general agent there under the laws of that State, may, upon subsequently appointing such agent, maintain an action to recover the assessment. *National Mut. Fire Ins. Co. v. Pursell*, 10 Allen, Mass. 231. 1865.

See Bonds of Agents, § 2. Evidence, 41, 43. Executions, 1. Garnishment or Trustee Process, 6. Lien, 7. Place of making Contract, 1, 4.

FRAUD.

§ 1. Case entertained in equity to compel the delivering up of a policy obtained by fraud, and where fraudulent loss was charged, although an action at law was pending on the policy. *French v Conelley*, 2 Anstruther,

454. 1794. See also *Duncan v. Worrall*, 10 Price, 31. (Exch.)

§ 2. Declaration set forth several rules and regulations of the company, and alleged that the secretary had fraudulently represented that they had been complied with, knowing the fact to be otherwise, and thereby induced plaintiff to take a policy in the company. Plea that the rules and regulations had been so fully complied with, as was necessary to protect the insurances. Plea held bad; and *Held*, that an action lay, although no special damage was averred beyond the payment of premiums. *Pontifex v. Bignold*, 3 Man. & Grang. 63. (42 E. C. L. 42.) 1841.

§ 3. A policy issued in class 4, of this company, was numbered 50, and it appeared that no policy had been issued in that class bearing a lower number. *Held*, that this numbering was not a fraud upon the defendant, as inducing him to believe that there were forty-nine persons more than there actually were, who would share the losses with him, as the numbering may have been entirely arbitrary. *Atlantic Mut. Fire Ins. Co. v. Goodall*, 9 Fost. N. H. 182. 1854.

§ 4. The fact of an agent having innocently made a misrepresentation of facts, while effecting a contract for his principal, will not amount to fraud upon the part of the latter, if the principal, though aware of the real state of facts, was not cognizant of the misrepresentation being made, nor directed the agent to make it. The company cannot be affected by any act of the agent, not within the scope of his authority. *Kelly v. Troy Fire Ins. Co.* 3 Wis. 254. 1854.

§ 5. If the parties have been induced to enter into contracts of insurance, upon a fraudulent representation by the agents and officers of a company, in regard to its capital or pecuniary resources and ability, or any other matter which rightfully influenced them in the negotiation,

they may be relieved against their contracts. *Jones v. Dana*, 24 Barb. N. Y. 395. 1857.

§ 6. When a party has been induced to enter into a contract by fraud, he may, on discovering the fraud, rescind the contract, and, by restoring the other party to the condition in which he stood before the contract, claim a return of what he has parted with, provided he do so at the earliest moment after discovering the fraud. In this case the defendant not having averred in the answer that he had done this; *Held*, that the fact could not be proved on the trial. *Devendorf v. Beardsley*, 23 Barb. N. Y. 656. 1857.

§ 7. General averment that the company is a fraudulent corporation without means or ability to pay losses, not sufficient to prevent judgment. If fraud is the defense, it must be shown in what it consisted. *Sterling v. Mercantile Mut. Ins. Co.* 32 Penn. St. 75. 1858.

§ 8. It is within the scope of an agent's authority to answer inquiries concerning the condition and property of the corporation, and its ability to fulfill its contracts. And in an action on a premium note, by the insurance company, the maker may set up in defense, false and fraudulent representations of the agent. And on trial of such an issue the entire transactions of the company may be inquired into. *Fogg v. Griffin*, 2 Allen, Mass. 1. 1861.

§ 9. An insurance company holding themselves out as solvent are not *conclusively* bound to know whether they are so or not; but if the officers neglect to use due care and diligence to know the condition of the company, and hold it out as solvent, when by use of such care and diligence they *might* know it was insolvent, there would be good reason for holding them guilty of fraud. *Brown v. Bonnell*, 49 Me. 421. 1860.

§ 10. The directors of an insurance company fraudulently permitting false statements of the condition and assets of the company to be published by its president and secretary, thereby inducing a party to insure in such company, are liable for any damage the insured may suffer from the insolvency of the company. *Salmon v. Richardson*, 30 Conn. 360. 1862.

§ 11. Where a policy by its terms is void, no action can be maintained thereon upon the ground that the insured was induced to accept it by the fraud of the insurer. *Tibbetts v. Hamilton Mut. Ins. Co.* 3 Allen, Mass. 569. 1862.

§ 12. Concealment of the existence of incumbrances, at the time when the ratification of a transfer of the policy was procured, is such a fraud on the company as vitiates the policy in the hands of the assignee. *Cumberland Valley Mut. Protection Co. v. Michell*, 48 Penn. St. 374. 1864.

§ 13. An applicant for insurance who owned the greater portion of the machinery in a factory, and to an amount far exceeding the insurance, and as landlord of the factory in which, together with his own, there was some machinery owned by a third person when the policy was granted, which before the loss he had seized under a landlord's warrant and bought in, has an insurable interest in the whole; and he is not guilty of fraud in not disclosing such other ownership when applying for insurance upon the whole. *Columbia Ins. Co. v. Cooper*, 50 Penn. St. 331. 1865.

See Agents, § 59. Evidence, 8, 20. False Swearing, 8. Negligence, 6. Pleading and Practice, 15, 85. Premium Notes, 21, 32. Questions for Court and Jury, 19. Set-off, 9. Stock Notes and Subscriptions, 1.

GARNISHMENT OR TRUSTEE PROCESS.

§ 1. A loss incurred on a fire insurance policy, the amount of which has been fixed by the award of arbitrators, indifferently chosen by the insured and insurer, may be levied on by attachment or execution, as a debt due to the assured. *Boyle v. Franklin Ins. Co.* 7 Watts & Serg. Pa. 76. 1844.

§ 2. The garnishee is liable on a claim for a loss unascertained when notice was served, but which was ascertained before answer; nor does any assignment of the claim by the debtor after notice affect the liability. *Franklin Fire Ins. Co. v. West*, 8 Watts & Serg. Pa. 350. 1845.

§ 3. Under trustee proceeding the defendant is entitled to any set-off which he could plead against the principal debtor, and is not liable for interest after the date of the notice. *Swamscot Machine Co. v. Partridge*, 5 Fost. N. H. 369. 1852.

§ 4. Action on a policy of insurance; plea, trustee process pending. *Held*, that the pending trustee process was no defense to the suit. The defendants might have applied for a stay of proceedings, if the trustee process were not determined before the trial came on. But the sum paid by the defendants, to satisfy the judgment against them in the trustee process, should be deducted from the amount due to the plaintiff at the time of the judgment. This would be an answer *pro tanto* to the plaintiff's claim, and would not require a special plea, as our statute provides that such a defense may be made under the general issue. As a general rule the garnishee will not be liable for interest, while the attachment remains in force, unless he has been found guilty of neglect or fraud. But if there has been any unreasonable delay oc-

casioned by the conduct of the garnishee, such case will form an exception to the rule that he is not chargeable with interest. *Nevins v. Rockingham Fire Ins. Co.* 5 Fost. N. H. 22. 1852.

§ 5. Certain policies were assigned to Middlesex Institution for Savings, as collateral security for a debt, with a stipulation that "any surplus of the proceeds of said policies is to be paid to William Crawford." The Savings Institution received the amount of the policies, and a creditor of Crawford sought to charge them with the surplus. *Held*, that the stipulation did not give Crawford a right of action for the surplus, and could not therefore render the Institution chargeable in the trustee process in favor of his creditors. *Field v. Crawford*, 6 Gray, Mass. 116. 1856.

§ 6. If a foreign insurance company have complied with the law of the State in regard to foreign insurance companies, and have an agent in such State, they are liable to garnishment, by process served on the agent; the latter being held to be a "chief or managing officer of such corporation," within the meaning of the 26th section of the execution law in Missouri. *McAllister v. Commonwealth Ins. Co.* 28 Mo. 214. 1859.

§ 7. Where a policy is assigned after loss, and the company is sought to be charged as garnishees of the assignor, it is the duty of the assignee to give notice of the assignment in season to enable the company to show such assignment in their answer, or, at least, before judgment against them. Having received such notice, if the company neglect to show it in defense, they cannot resist a subsequent claim of the assignee; and on the other hand, having shown such assignment, they cannot be charged as garnishees. *Walters v. Washington Ins. Co.* 1 Iowa, 404. 1855.

§ 8. An unadjusted or unliquidated claim for a loss upon a policy of insurance against fire, is subject to attachment in the hands of the insurance company. *Girard Fire Ins. Co. v. Field*. Supreme Court of Pa. at Philadelphia, 1862. Cited by the "Legal and Insurance Reporter" of Philadelphia.

§ 9. Where a policy provided that the loss, if any, should be paid within sixty days after due notice and proof thereof, &c.; *Held*, that the claim was contingent, and that the company could not be charged as trustees of the insured in an action commenced after a loss, but before notice and proof. *Davis v. Davis*, 49 Me. 282. 1862.

§ 10. An insurance company is not chargeable as trustee for the amount of a loss under a policy after payment thereof, made in good faith by its authorized agent, without knowledge of any actual or intended service of process upon the company, although such payment was made after the service of the writ upon the secretary of the company, if there was no neglect of duty in giving notice of the service to the agent. And such neglect of duty is not shown by the omission of the secretary for three hours after service, to send notice thereof from B. to W., a distance of forty miles, if the agent has temporarily gone to the latter place for the purpose of investigating, and with authority to adjust the loss. *Spooner v. Rowland*, 4 Allen, Mass. 485. 1862.

§ 11. In Pennsylvania an unadjusted and unliquidated claim for a loss upon a policy of insurance against fire is subject to attachment in the hands of the insurance company. *Girard Fire & Marine Ins. Co. v. Field*, 45 Penn. St. 129. 1863.

§ 12. Until proof and an adjustment of a loss according to the terms and conditions of the policy, or their waiver by the assurer, the liability is contingent, and the assurer is not liable under the statute of Minnesota as

garnishee of the insured. *Gies v. Bechtner*, 12 Minn. 279. 1867.

See Damages, § 9. Limitation Clause, 15. Set-off, 8. Pleading and Practice, 64.

GENERAL AVERAGE.

§ 1. A fire happening in the vicinity of the building, containing the insured goods, the assured, with the consent of the underwriters, bought some blankets and spread them over the windows and doors and thus saved the building and contents, but the blankets were destroyed. *Held*, that the loss of blankets was not one protected by the policy, but that assured might claim on the ground of a sacrifice made by them for the preservation of the property endangered by the fire, and for a proportion of which sacrifice they were equitably if not legally entitled to recover. *Held*, further, that the adjoining buildings, which might also have been destroyed, had the store containing the insured goods taken fire, and on which the defendants had underwritten, were not liable to pay a portion of this expense, as the contribution must be limited to the building and property therein, immediately saved. *Welles v. Boston Ins. Co.* 6 Pick. Mass. 182. 1828.

GOODS IN TRUST OR ON COMMISSION.

§ 1. The assured were commission merchants and took out a policy with defendants for “\$10,000, on merchandise in their store and by them held in trust.” At time of effecting the insurance, they represented to the company that they were in the habit of receiving goods for sale; that they had made advances on some of them, and upon some had not made advances; that the goods on hand were constantly changing by sales and new consignments; and that they wished a policy on such goods to secure themselves against loss by fire, as the consignors might not be able to repay the advances. These representations being by agreement, made part of the case; *Held*, that the policy covered all the goods which assured held as consignees, but that it must be limited to the interest which they had in the goods at the time of the loss, and could not be extended so as to protect the interest of any of the consignors. *Parks v. General Interest Assurance Co.* 5 Pick. Mass. 34. 1827.

§ 2. Where the policy insured “goods, as well the property of the assured, as those held by them on commission;” and further agreed to make good to the assured all loss and damage, to be estimated according to “the true and actual value” of the property at the time the loss shall happen; *Held*, that assured might recover the whole value of such property destroyed, and not merely their lien or advances made thereon. *De Forest v. Fulton Fire Ins. Co.* 1 Hall, N. Y. 84. 1828.

§ 3. Under policy in plaintiff’s own name, providing that “goods in trust or on commission must be insured as such,” &c.; *Held*, that plaintiff could not recover for advances made on certain musical instruments left with him in trust, as they were not covered by the policy.

Brichta v. New York Lafayette Ins. Co. 2 Hall, N. Y. 372. 1829.

§ 4. Where assured took out a policy of insurance against fire "on his goods, stock in trade, &c., or on commission, or held in trust;" *Held*, that the policy covered goods in stores, bought on joint account and sold for the mutual profit of the insured and another party, the insured being also in advance on the adventure. *Held*, also, that insured was absolute owner of one half of the goods in stores, and had an insurable interest in them, as "stock in trade," and also to cover his advances on the whole stock. *Millaudon v. Atlantic Ins. Co.* 8 La. 557. 1835.

§ 5. A policy on "merchandise generally and without exception their own, or held by them in trust, or on consignment," in the warehouse of a commission and forwarding merchant, covers "household furniture, wearing apparel and books" received and held on deposit by the said firm subject to the order of the owner; and such owner can recover his proportionate share of the insurance money received by the said firm under such policy. *Siter v. Morris*, 13 Penn. St. 218. 1850.

§ 6. Policy provided that goods in trust or on commission must be insured as such, otherwise the policy will not cover such property. Assured took out policy in his own name without declaring that the goods were in trust, and subsequently endorsed upon it a transfer to his landlord, with a recital that he had effected it for his use, and as his agent. Upon motion to take off nonsuit; *Held*, that the policy was within the clause; and that the nonsuit was rightly entered. *Keely v. Insurance Co.* 1 Philadelphia, Pa. 175. 1851.

§ 7. One of the conditions of a policy was in these words: "Goods held in trust or on commission are to be declared and insured as such, otherwise the policy will

not cover such property ; goods on storage must be separately and specially insured." The assured held the goods in pawn. *Held*, that they were goods in trust, and, as he made no declaration and insurance of them as such, according to the condition of his policy, they were not covered by it. *Rafael v. Nashville Marine & Fire Ins. Co.* 7 La. An. 244. 1852.

§ 8. Insurance was upon "goods his own or held by him for others on commission" by a policy stipulating that only three-fourths of the value of the property should be paid ; *Held*, that assured might recover the full three-fourths of the value of the goods, although consignor had not ordered the insurance or known of the policy, and although assured had not made any advances on them. *Lee v. Howard Fire Ins. Co.* 11 Cush. Mass. 324. 1853.

§ 9. Coach builder took policy on stock, his own, and held in trust and on commission. *Held*, that out of the insurance money he might pay himself in full, and *quære*, whether he could be compelled to divide the surplus with his customers. *Dalglish v. Buchanan*, 16 Cases in the Court of Sessions, N. S. 332. 1854.

§ 10. A provision in a policy, that "property held in trust or on commission must be insured as such," otherwise the policy will not cover it, includes everything in which the insured has only a qualified interest with the possession, while the ownership is in a third person. *Turner v. Stetts*, 28 Ala. 420. 1856.

§ 11. Assured was described as a "corn and flour factor ;" the policy was, amongst other things, on goods in his warehouses and on "goods in trust or on commission therein." The company covenanted to make good "any damage by fire to the property insured." The assured was a wharfinger and warehouse man ; he had in his warehouses goods belonging to his customers, which were de-

posited with him in that capacity, and on which he had a lien for the charges, cartage and warehouse rent, but no further interest of his own. No charge was made to customers for insurance, nor were they informed of the existence of the policy. The assured's warehouse was consumed by fire with all the goods in it. The company paid the value of the assured's own goods and the amount of his lien on his customers' goods, but refused to pay the value of the customers' interest in the goods beyond the lien. *Held*, that the goods of the customers were "in trust," within the meaning of the policy, and that the assured was entitled to recover the entire value. *Waters v. Monarch Fire & Life Ins. Co.* 5 Ellis & Black. Q. B. 870. (85 E. C. L. R. 868.) 1856.

§ 12. Plaintiffs were manufacturers of clothing, and were insured \$27,500, under different policies, as follows: "On their stock of ready-made clothing and other hazardous merchandise, the property of insured, or held by them in trust or on commission, or sold but not delivered, contained in No. 112 Fulton Street." Defendants had left with plaintiffs a lot of cloth to be manufactured into clothing, and, while in their possession, part of it was destroyed by fire, together with all the stock of plaintiffs, who made out a schedule only of their own property, which exceeded \$27,500, amount insured, and received the entire sum from insurance companies.

This action was brought by plaintiff to recover of defendant the amount due for making and trimming his cloth. A clause in the above policies was, that property "held in trust or on commission must be insured as such, otherwise the policy will not cover such property." *Held*, that the goods of the defendant were goods held in trust by the plaintiff; that the words, "held in trust," in the policy, were sufficient to cover defendant's goods, and that it was a just presumption that the words were used to protect goods so situated, and hence, the burden was on the plaintiff to show that the words had been employed by him in a restricted sense, to wit, "as only covering goods for

which orders to insure had been received ;” and, such fact not having been shown, defendant was entitled to offset his proportion of the insurance money against the plaintiff’s demand for manufacturing the cloth. *Stillwell v. Staples*, 6 Duer, N. Y. 63. 1856. Reversed, 19 N. Y. 401. 1859.

§ 13. These words in a fire policy: “The property of the insured or held in trust,” include cloth left with the assured to be manufactured into clothing. *Stillwell v. Staples*, 19 N. Y. 401. 1859.

§ 14. Where a policy was issued to a common carrier “on goods” in a certain warehouse as “his own and in trust as carrier ;” *Held*, in an action on the policy, that to the amount named, the whole value of goods in the warehouse in the possession of the plaintiff as carrier was covered by the policy and not merely the plaintiff’s interest as carrier in such goods, notwithstanding a condition of the policy that “goods held in trust, or on commission, were to be insured as such, otherwise the policy should not extend to cover such property.” *London &c. Railway Co. v. Glyn*, 1 Ell. & Ell. Q. B. 652. (102 Eng. C. L.) 1859.

§ 15. Where a condition in a policy of insurance provided “that property held in trust or on commission, must be insured as such, otherwise the policy will not cover such property * * * * By property held in trust is intended property held under a deed of trust, or under the appointment of a court, or held as collateral security.” *Held*, that holding property in secret trust, to defraud the creditors of the real owner, was not such a holding in trust as was contemplated by the condition—that if held as a security for a debt, it would be within the condition. *Ayres v. Hartford Fire Ins. Co.* 17 Iowa, 176. 1864.

See Damages beyond Actual Loss, § 3. By-laws and Conditions, 14. Interest in Policy, 2. Other Insurance, 100. Pleading and Practice, 84.

GUNPOWDER.

§ 1. Insurance was on "six buildings in Mobile, Alabama, and privileged to contain extra hazardous merchandise." Some of assured's tenants, without his knowledge, kept gunpowder on his premises, and in course of the conflagration it exploded. The words, "gunpowder is not insurable unless by special agreement," were inserted in the enumerations of hazards at the end of the extra hazardous articles, and immediately following them was the memorandum of "special hazards." *Held*, that by a proper construction of the policy, gunpowder was included among the extra hazardous articles, and the buildings being privileged to contain extra hazardous articles, the assured had a right to put gunpowder in them; but in case of loss by fire, he was not entitled to compensation for the loss of such gunpowder, as there was no special agreement to insure it. *Duncan v. Sun Fire Ins. Co.* 6 Wend. N. Y. 488. 1831.

§ 2. Placing gunpowder in a building with a lighted match for the purpose of blowing it up, to prevent the spread of a conflagration, is not a storing of it, within the meaning of the clause prohibiting "the storing of gunpowder on the premises." *City Fire Ins. Co. v. Corlies*, 21 Wend. N. Y. 367. 1839.

§ 3. Where by the conditions subjoined and referred to, in a policy of insurance on goods against fire, it is declared, "that if there should at any time be more than twenty-five pounds weight of gunpowder on the premises insured, or where any goods are insured, such insurance should be void, and no benefit derived therefrom," &c.; the deposit of gunpowder, over the above mentioned weight, will avoid the policy, although it was brought into the store for shipment, and was removed from the

store at the time the fire broke out, but long before the fire reached the building containing the goods insured. *Faulkner v. Central Fire Ins. Co. of New Brunswick*, 1 Kerr, New Brunswick, 279. 1841.

§ 4. Where policy provided that "the keeping of gunpowder for sale or on storage upon or in the premises insured, without written permission, shall render the policy void," and it was shown that assured had a small quantity of powder in the store, and for sale, before the policy was issued, and that it remained there until the building was destroyed, but none was either sold or offered for sale after the policy issued; *Held*, that the policy was not thereby avoided. *Protection Ins. Co. v. Harmer*, 2 Ohio St. (22 Ohio) 452. 1853.

§ 5. Policy of insurance against fire, "on a stock of goods and merchandise contained in plaintiff's store," provided that "the keeping of gunpowder for sale or on storage upon or in the premises insured should render the policy void." The assured kept a country store, and usually had one to two kegs of powder on hand, from which he retailed to customers, and had one keg at time of fire. In evidence it had been shown that it was usual to keep gunpowder in small quantities as part of the stock of such store. *Held*, that the word "premises" referred to buildings insured, and that the gunpowder was not kept "upon or in the premises insured," within the meaning of the above prohibition. *Leggett v. Aetna Ins. Co.* 10 Rich. Law, S. C. 202. 1856.

§ 6. Where one of the printed clauses in a policy of insurance made the policy void, in case "gunpowder" should be kept upon the premises without written consent and permission of the company, and a second printed clause provided "that no greater amount than twenty-five pounds of gunpowder shall at any time be placed in the building described in this policy, said powder to be kept in tin or other metallic canisters," and there was no other clause,

either written or printed, in reference to it; *Held*, that the second clause was a modification of the first, and permitted the assured to keep on hand in tin or metallic cannisters any amount of gunpowder not exceeding twenty-five pounds. *Bowman v. Pacific Ins. Co.* 27 Mo. 152. 1858.

§ 7. Where by a fire policy it was provided that the keeping of gunpowder "without written permission in the policy" should render the policy void; *Held*, that if the agent taking insurance on a stock of goods knew that gunpowder was kept and to be kept, the keeping it would not render the policy void, whether permission to keep it was endorsed or intended or neglected to be endorsed or not. *Peoria Marine Fire Ins. Co. v. Hall*, 12 Mich. 202. 1864.

See Risk, § 5, 6, 11. Use and Occupation, 41.

ILLEGALITY OF CONTRACT.

§ 1. Two men agreed, in partnership, to undertake insurance, and, at the close of business, one brought a bill against the other for an account, &c. Dismissed, because such joint business was prohibited by Stat. 6, Geo. I, c. 18, s. 12. *Watts v. Brooks*, 3 Ves. 612. 1798.

§ 2. No recovery can be had under an agreement for illegal insurance, though the money had been paid to the broker. *Thompson v. Thompson*, 7 Ves. 470. 1802.

§ 3. A contract, in consideration of forty guineas, to pay one hundred pounds in case Brazilian shares should be done at a certain sum on a certain day, subscribed by several persons, each for themselves, is void as a gambling

policy of insurance under 14 Geo. III, c. 48. *Patterson v. Powell*, 9 Bing. 320. (23 E. C. L. 598.) 1832.

§ 4. An insurance company in making a loan may lawfully require the borrower to insure the property with the company, and pay the premium in addition to the legal rate of interest. *New York Fire Ins. Co. v. Donaldson*, 3 Edw. Ch. N. Y. 199. 1838.

§ 5. After a proposition made to an insurance company, an agreement entered into and the benefit for which he stipulated received from it, it does not lie with assured to say that his proposition was not such as the statute contemplated. *Hill v. Reed*, 16 Barb. N. Y. 280. 1853.

§ 6. By the charter of an insurance company, all persons insured became members of the company, and all claims and losses, sustained to a greater amount than the company had funds on hand to discharge, were to be raised by assessment to be made ratably on the members according to the amount of each member's insurance, provided that such assessment should not exceed the amount of the note or obligation given by each member, and one per cent. on the principal sum mentioned in each policy. After the business had been carried on for some time, the directors resolved that the company should raise a guaranty capital of \$150,000, which should be put up in money bonds, payable on demand, and secured by a mortgage or stocks as collateral security, which should be liable to assessment *pro rata* to make good any losses which the company might sustain after all other available means had been exhausted. The contributor to such capital was to receive six per cent. per annum on the amount of his bond out of the earnings of the company. The corporation having become insolvent, an assessment was made by the order of this court on the guaranty capital, and a bill filed to recover on the defendant's mortgage the amount assessed against him. *Held*, that the corporation had no

power to enter into contract with the contributors to the guaranty fund; and that such contract was illegal and void, and could not be enforced either in a court of law or equity. *Trenton Mut. Life & Fire Ins. Co. v. McKelway*, 1 Beasley, N. J. 133. 1858.

§ 7. A policy issued by a mutual insurance company, organized under the act of April 10, 1849, in New York, is valid, although the premium for such policy was paid in cash, instead of by premium or deposit note. *Union Ins. Co. v. Hoge*, 17 How. N. Y. 127. 1858.

§ 8. This clause, "Any person applying for insurance, so electing, may pay a definite sum in money, to be fixed by said corporation, in full for said insurance, and in lieu of a premium note," in the charter of a mutual insurance company in New York, is not in violation of the provisions of the act of 1849 in New York, under which the company was organized, and the company may legally take cash premiums in lieu of deposit notes. The receipt of such cash premiums does not destroy the principle of mutuality. *Mygatt v. New York Protection Ins. Co.* 21 N. Y. 52. 1860.

§ 9. Where a mutual insurance company in New York received both cash and premium notes for policies of insurance, and all the cash received had been expended in payment of losses; *Held*, that the premium notes were liable to pay losses under cash policies issued by the company, and that assessments on such premium notes for the payment of such losses were not illegal. *White v. Havens*, 20 How. N. Y. 177. 1860.

§ 10. At the common law, as well as under the statute of New York against betting and gaming, a policy of fire insurance is void, unless the party insured has at the time an insurable interest in the property insured. *Freeman v. Fulton Fire Ins. Co.* 38 Barb. N. Y. 247. 1862.

§ 11. Wager policies of fire insurance are void at common law, irrespective of any statute. *Freeman v. Fulton Fire Ins. Co.* 14 Abb. Pr. 398. 1862.

See Classification of Risks, § 4. Foreign Insurance Companies, 23. Mutual Insurance Companies and Members of, 4. Payment of Premium, 11.

INCREASE OF RISK.

§ 1. The articles of the company authorized the trustees to declare any policy null and void on the happening of certain things whereby the risk was rendered greater. In this case the trustees declared the policy void because of the putting up a frame building adjoining the house insured. In an action on the policy; *Held*, that the issue as to whether the alteration made did in fact increase the risk was material, and must be sustained in order to defeat the policy. *Stetson v. Massachusetts Mut. Fire Ins. Co.* 4 Mass. 330. 1808.

§ 2. Where policy contained no provision against an increase of risk, other than the general statement of hazards, among which the erection of buildings adjoining the premises insured was not mentioned; *Held*, that the erection of other buildings adjoining the one insured, would not avoid the policy, although the risk was thereby increased, unless it were shown that the fire was occasioned by such increase of risk. *Stebbins v. Globe Ins. Co.* 2 Hall, N. Y. 632. 1829.

§ 3. Under clause, that "if risk be increased by advice, agency, or consent of assured, &c. the policy should be void;" *Held*, that if the jury should find that alterations made by assured had increased the risk, the policy would be void. *Curry v. Commonwealth Ins. Co.* 10 Pick. Mass. 535. 1830.

§ 4. Policy provided, that "if any alteration should be made in any house or building, by the proprietor thereof, after insurance has been made thereon, with said company, whereby it may be exposed to greater risk or hazard, from fire, than it was at the time it was insured, then, in every such case, the insurance shall be void, unless an additional premium and deposit, after such alteration, be settled with, and paid to, the directors; but no alterations or repairs in buildings, not increasing such risk or hazard, shall in anywise affect the insurance previously made thereon." In an action on the policy; *Held*, that any alteration made in the building insured by the advice or consent of, or with the knowledge of the assured, would avoid the policy, if a higher rate of premium would have been demanded to insure the building in its altered state than would have been demanded before; if a higher rate of premium would not have been demanded, the alteration was immaterial; but, if material, the policy would be avoided, although the loss was not occasioned by such alteration. *Merriam v. Middlesex Mut. Fire Ins. Co.* 21 Pick. Mass. 162. 1838.

§ 5. Policy covered certain buildings in Columbia, including two kitchens of wood and shingles. Two weeks before the fire, one in possession built an oven in the kitchen, put up frames for drying meat, and smoked it, and the fire originated in that kitchen. One condition of the policy was, "that an appropriation of the premises for any of the trades, business or vocations, denominated hazardous, extra hazardous, or included in the memorandum of special rates, in the condition annexed to the policy, should suspend the policy whilst thus appropriated." The policy was also made and accepted in reference to the conditions annexed, which were to be resorted to, to explain the rights and obligations of the parties. Among the conditions thus referred to came first, a list of hazardous, extra hazardous, and special hazardous articles, but no mention of "smoking meat." Then followed a provision that "if the risk should be increased by any means within control

of the assured, or the house occupied so as to render the risk more hazardous, the policy should be void." *Held*, that the provision against an increase of risk by acts of assured, was not to be controlled or limited by the previous condition or specification of hazards, but was an independent condition of itself, and although the particular act done, therefore, was not included in the said classes of hazards, yet, if it increased the risk, the policy was thereby avoided. *Boatwright v. Ætna Ins. Co.* 1 Strobhart, S. C. 281. 1847.

§ 6. Under condition that "if risk be increased by any means within control of the assured, the insurance shall be void," the erection of other buildings by assured on his own premises, near the property insured, so as to increase the risk, avoids the policy. *Murdock v. Chenango Mut. Ins. Co.* 2 Comst. N. Y. 210. 1849.

§ 7. Policy on stock in trade and utensils in a certain room and in open yard, with conditions that in case of alterations increasing the risk or of removal of any property insured to other premises, it should be void, unless the same were notified to the company. Certain boilers were removed from the yard into the building. *Held*, 1st, that the burden of showing an increase of risk, or of showing that there was no notice given, was upon the company; 2d, that the question was not whether the removal of the boilers increased the risk, but whether the use of them in the ordinary way increased the risk; 3d, that a plea, that the boilers were put in use and used, was bad; it should have averred a perpetual use. *Barrett v. Jermy*, 3 Wels. Hurls. & Gord. 535. (Exch.) 1849.

§ 8. Assured erected a new building beside one insured without notice to the insurers, the policy being silent on the subject, and no injury having resulted therefrom; *Held*, that the policy was not thereby rendered invalid. *Gates v. Madison County Mut. Ins. Co.* 1 Seld. N. Y. 469. 1851.

§ 9. Where policy provided that "in case of any material increase of risk to the property insured in this company, such increase of risk must be notified to the company and written permission therefor be obtained from the secretary, for which such charge as may be proper must be paid," and the jury were instructed that the assured could not recover, if they should find that certain improvements or alterations either in themselves or during their progress to completion, occasioned "any additional increase of risk;" *Held*, that such instruction was erroneous, as the increase of risk, to avoid the policy, must be that specified by the condition, to wit: a "material increase." *Held* further, that, assuming the increase of risk to be material, a failure on the part of assured to give the notice could not be excused on the ground that he had used reasonable diligence to give such notice, but had been prevented by the negligence or misconduct of the company or its secretary. *Allen v. Mutual Fire Ins. Co.* 2 Md. 111. 1852.

§ 10. In the absence of any stipulation to that effect, the erection of a building adjacent to the one insured, by the party holding the policy, though it may increase the risk, will not avoid the policy. But if such an act of the assured party is the cause of the loss to the company, the insured cannot recover, as the loss is occasioned by his own misconduct. *Howard v. Kentucky & Louisville Mut. Ins. Co.* 13 B. Monroe, Ky. 282. 1852.

§ 11. The policy in this case was on a dwelling house. At time it was made there was a store, belonging to assured, standing within thirty-six feet of the dwelling insured, the existence of which had been made known to the insurers in the application. Whilst the policy was in force, the store building burnt up, and assured went to work to rebuild the same; and in course of such re-building, the carpenters kept their benches and tools in the store building and worked in wood, making shavings, &c. The store building then took fire during a high wind and

communicated the flames to the dwelling insured, which was also destroyed. The insurers had had no notice of this re-building, nor was there anything in the policy prohibiting it. *Held*, that assured having used reasonable care in the re-building of the store building, was entitled to recover. *Young v. Washington County Mut. Ins. Co.* 14 Barb. N. Y. 545. 1853.

§ 12. The assured received from defendants a policy of insurance for £750, by which they insured on a stone building £400, and on furniture and other goods therein £200—all at the rate of eight per cent.; on a frame building £100, and on goods and tools therein £50—all at the rate of twelve per cent. One of the conditions of the policy was “that if after insurance effected, the risk shall be increased by any means whatever within the control of the assured, or if such building or premises shall be occupied in any way so as to render the risk more hazardous than at time of insuring, such insurance shall be void.” It was proved that after effecting this insurance the assured put up a steam engine in the frame building, and, in order to make it as safe as possible, erected a small engine house of brick at the back of the building. Some witnesses swore that if care was taken, the risk would not be increased, but many swore that it would; and it was proved that the assured was told by the agent of the company that if he put up the engine he would have to apply and pay an additional premium; that he made no such application; that he endeavored to effect an insurance at other offices, but was refused, the risk being considered too hazardous, and that he had made no arrangement with defendants in consequence of the additional risk. The frame building was destroyed by fire which began in the upper part of it, and a portion of the goods in it were destroyed. The stone house was also much injured by the same fire, and the furniture in it partially destroyed. *Held*, that as a matter of form it was necessary to submit it to the jury, whether in fact the risk had been increased, but that under the facts

proved, the policy was clearly avoided. *Reid v. Gore District Mut. Fire Ins. Co.* 11 Upper Canada, Q. B. 345. 1853.

§ 13. The mere fact of a building insured as a "dwelling house" being subsequently vacated, will not avoid the policy, although the risk be thereby increased, if the insured intended it to be used as a dwelling house, and was making reasonable efforts to get a new tenant. *Gamwell v. Merchants' & Farmers' Mut. Fire Ins. Co.* 12 Cush. Mass. 167. 1853.

§ 14. Under clause, that, if risk be materially increased without assured's agency or consent, notice thereof shall be given to the company or the policy shall be void; *Held*, that such an increase of risk, without notice, avoided the policy; and that the burden of proof of notice was upon the assured; and that it was immaterial whether the loss happened in consequence of such increased risk or not. *Gardiner v. Piscataquis Mut. Fire Ins. Co.* 38 Me. 439. 1854.

§ 15. Policy provided that "all members owning property assured in the company, in which the risk has been changed, either within itself or by surrounding and adjacent buildings, shall give notice thereof to the directors in writing as early as possible, and shall pay such additional premium as they shall determine." And the policy also prohibited the storing in the premises of any of the articles denominated hazardous (of which hay was one), unless specially agreed to by the company. The property insured was a store and dwelling, and, subsequent to the insurance, the assured put up a small frame addition 12x14 adjoining the store, designed for a brewery, and of which no notice was given to the company. A few days before the fire a quantity of hay was placed in this new building, out of which plaintiff's cow was fed up to the time of the fire, and the fire itself originated in this building and when first discovered was all over the hay. Under this

state of facts the court instructed the jury, that if the risk had been increased, the assured could not recover; and the jury rendered verdict for the assured. *Held*, that the instruction of the court was correct, but the verdict of the jury clearly against the evidence, and the verdict must be set aside. *Francis v. Somerville Mut. Ins. Co.* 1 Dutch. N. J. 78. 1855.

§ 16. The clause respecting increase of risk contemplates something permanent or habitual. *Leggett v. Aetna Ins. Co.* 10 Rich. Law, S. C. 202. 1856.

§ 17. The underwriter, in entering into a contract of insurance on a mechanical establishment, can be presumed to insure only against risks arising from the usual and appropriate mode of carrying on such business. But if a new invention, not in common use, be introduced, materially increasing the risk, without the consent of the company, it may avoid the policy. *Washington County Mut. Ins. Co. v. Merchants & Manufacturers Mut. Ins. Co.* 5 Ohio St. 450. 1856.

§ 18. Any increase of risk, incident to the making of reasonable and necessary repairs, is part of the general risk assumed by the insurers and will not avoid a policy; and such an increase of risk does not come within the purview of a general condition, reciting that "if, after insurance effected, the risk shall be increased by any means whatever within the control of assured, such insurance shall be void and of no effect." *Townsend v. Northwestern Ins. Co.* 18 N. Y. 168. 1858.

§ 19. Policy provided that if the risk "be increased, by the erection of buildings, or by the use and occupation of neighboring premises, or otherwise, of which prompt written notice shall be given to the company by the assured, or if for any other cause the company shall so elect, it shall be optional with the company to terminate the in-

surance," &c. The risk was increased during continuance of the policy, by acts of third parties, but no notice of same given to the company; *Held*, that the only thing required by the condition was "prompt written notice," and as the company could not assume that they would have terminated the insurance, had notice of such increase of risk been given, and as the fire was not caused by such increase of risk, the company could not introduce evidence of such increase of risk, to avoid the policy. *Joyce v. Maine Ins. Co.* 45 Me. 168. 1858.

§ 20. A policy of insurance against loss by fire provided, that "in case of any alteration, &c., to the building insured, notice thereof should be given to the secretary or any agent of the company, and their consent obtained, and that, in default of such notice and consent, the policy should be void." The insured subsequently erected a steam engine in the mill, insured as a water power mill. *Held*, 1st, that the erection of such engine, and proof that the risk was thereby increased, without the notice or consent of the insurers, avoided the policy; 2d, that notice to the agent of the company of such erection, could not be proved by evidence of conversations with third parties, in which the erection of the steam engine was spoken of. 3d, that knowledge of the fact by the agent did not affect the company with knowledge, though notice to the agent would do so. *Sykes v. Perry County Mut. Fire Ins. Co.* 34 Penn. St. 79. 1859.

§ 21. Where policy provided that notice must be given in writing to the company, and their consent obtained, to any material alteration or repairs in the premises insured, or "in default thereof any loss happening to the said insured premises by reason of making said repairs or alterations shall not be paid or demanded under this policy," and, under such policy, there was a total destruction of the building, whilst repairs were being made by the tenant, unknown to assured, who had never notified the company of the same or obtained their consent, and, it

having been shown upon the trial that the loss was occasioned either altogether or to an unknown extent by such unauthorized alteration, which increased the risk; *Held*, that the loss must fall on the assured, unless he furnished proof of some loss occasioned by other causes than such alteration; that the burden of proof was on him and not on the company. *Howell v. Baltimore Equitable Society*, 16 Md. 377. 1860.

§ 22. Where the policy provided that "any alterations or repairs made in or about the insured property must be at the risk of the party insured;" *Held*, that alterations or repairs did not *per se* avoid the policy, but only that the assured party should assume the hazard of their increasing the liability of the insurer. *Girard Fire & Marine Ins. Co. v. Stephenson*, 37 Penn. St. 293. 1860.

§ 23. In an action to recover for a loss by fire which originated in an adjoining carpenter shop, (belonging to and used by the assured,) the location of which was properly given in the application for the insurance, it is not error to permit the jury to decide whether stoves are customary and necessary in a carpenter shop, coupled with instructions that, if not necessary and customary, the assured could not recover. Nor is it error in such a case for the court to permit the jury to decide, whether the placing of a steam engine in the shop, by which the stoves were superseded, had increased the hazard over what it would have been from the stove alone, with the instruction that, if it had done so, and the loss was the result of the change, the plaintiff must fail; but if not, the loss must fall on the company, even though the fire may have originated from the engine. *Girard Fire & Marine Ins. Co. v. Stephenson*, 37 Penn. St. 293. 1860.

§ 24. An increase of the risk after an insurance is effected by means within the control of the assured will, where the policy contains a condition to that effect, avoid the policy. *Dodge County Mut. Ins. Co. v. Rogers*, 12 Wis. 337. 1860.

§ 25. Where a building was originally constructed, and several times used, for the purposes of an exhibition of industry, or fair; and the defendants, knowing its use, had several times insured its owners or lessees in respect to it, and the plaintiffs, subsequently becoming its owners, procured the defendants to insure them in respect to it; *Held*, that the plaintiffs had a right, after obtaining such insurance, to occupy and use the building for the same purposes; but that, if it was used otherwise than as a mere place of exhibition, or was so occupied or used as to render the hazard greater at the time of the fire than when the insurance was effected, the plaintiffs were not entitled to recover thereon. *Mayor &c. of New York v. Exchange Fire Ins. Co.* 9 Bosw. N. Y. 424. 1862.

§ 26. A policy of insurance upon personal property contained a condition that if the building in which it was kept should be used for the purpose of storing any of the articles denominated "hazardous," except as specially agreed to by the company, and indorsed on the policy, the insurance should be void. The policy contained a schedule of articles denominated "hazardous," among which was "wine in casks," the same being placed under the head of articles considered hazardous on account of their liability to damage, but for which the rate on the building was not to be increased. *Held*, that a reasonable construction of this condition would make it apply only to the class of hazardous articles by which the risk to the building was increased; and that the policy was not vitiated by reason of the storage of wine in casks. *Rathbone v. City Fire Ins. Co.* 31 Conn. 193. 1862.

§ 27. Where a policy of insurance specifies the uses to which the premises are applied, a mere increase of risk does not avoid the policy unless it arises from something else than their appropriation to the uses which are contemplated and covered by the policy. *Mayor &c. of New York v. Hamilton Fire Ins. Co.* 10 Bosw. N. Y. 537. 1863.

§ 28. When the plaintiffs procured a policy on their merchandise in their storehouse, and another on their factory; and the former contained a provision that "if the risk be increased by any means whatever within the control of the assured," it should be void, but no limitation as to the time the plaintiffs were to run their factory, but such limitation was contained in the latter; and, subsequently, such limitation was removed by the written permit of the defendants in consideration of an additional premium; *Held*, that the policies were distinct and independent; and the removing of the limitation was not an "increase of the risk," within the meaning of the former policy. *North Berwick Co. v. New England Fire & Marine Ins. Co.* 52 Me. 336. 1864.

§ 29. If a policy of insurance, issued by a mutual fire insurance company, contains a stipulation that "if, subsequent to the making of the application, any new fact shall exist, either by a change of any fact disclosed in the application, the erection or alteration of any building," &c., "by the assured or others, or any change be made not named in the application, and specifically permitted by the policy, the policy thereon shall be void, unless written notice be given to the directors, their written consent, signed by the secretary, obtained, and an additional premium or deposit paid," the policy will be avoided by the erection or alteration of a building upon the premises, without obtaining a written consent, signed by the secretary, or paying any additional premium or deposit. *Evans v. Tri-mountain Mut. Fire Ins. Co.* 9 Allen, Mass. 329. 1864.

§ 30. A policy of insurance which is issued upon a dwelling-house in consequence of an express oral promise, by the applicant, that it shall be occupied, will not be avoided by the failure to fulfill such promise, unless fraud is proved; even though the risk is thereby increased. *Kimball v. Ætna Ins. Co.* 9 Allen, Mass. 540. 1865.

§ 31. Where an insurance was "on barley and malt in assured's malt-house and brewery," and a condition was that the risk should not be increased without notice to the company and endorsement on the policy, the fact that the assured carried on distilling in the building is fatal to the claim of the assured for loss, unless the company had notice of the distilling before the insurance. *People's Ins. Co. v. Spencer*, 53 Penn. St. 353. 1866.

§ 32. If after an insurance is effected upon goods in a specified building, the insured rent a part of the building to other persons, who apply the same to purposes prohibited by the policy as being hazardous or extra hazardous, this will avoid the policy, although the goods insured are not in that part of the building so let. *Appleby v. Firemen's Fund Ins. Co.* 45 Barb. N. Y. 454. 1866.

§ 33. Where a policy is for a year, and is renewed and then is substituted by a new policy, and the assumption of an additional risk by endorsement on such policy, notice of an increased risk given before the renewal of the original policy runs through all subsequent insurances. *People's Ins. Co. v. Spencer*, 53 Penn. St. 353. 1866.

§ 34. When alterations and additions to a building materially increase the risk, so that the insurer would be entitled to a higher rate of premium, the policy will be treated as absolutely void if the insured fail to give notice as required by the terms of the policy. *Kern v. South St. Louis Mut. Ins. Co.* 40 Mo. 19. 1867.

See Alteration, § 1, 2, 3 4. Burden of Proof, 8, 9. By-Laws and Conditions, 2, 11. Description of Property, 10. Evidence, 4. Other Insurance, 51. Parol Evidence, 14. Pleading and Practice, 18, 19, 52. Questions for Court and Jury, 4, 7. Responsibility of Assured for Acts of Others, 2, 4. Use and Occupation, 6, 10, 30, 32, 43, 44, 47, 57, 64. Warranty and Representation, 1, 2, 6, 20, 29.

INSOLVENCY.

§ 1. Creditor has no preference because he loaned money to company to pay a loss prior to the great fire. No creditor is entitled to preferences unless he has legal or equitable lien, or specific appropriation of some particular part of corporate property or funds. Creditors not limited to amount of capital stock at time of losses. Premiums, not capital stock, are the primary fund for payment of losses, and to be first exhausted. *De Peyster v. American Fire Ins. Co.* 6 Paige, N. Y. 486. 1837.

§ 2. Creditors of insolvent company, on bill to close up, to be paid ratably, without reference to time of maturity of debts. Creditor for loss before the great fire, which made the company insolvent, not entitled to any precedence of payment. *Lowene v. American Fire Ins. Co.* 6 Paige, N. Y. 482. 1837.

§ 3. B. assigned policy to mortgagees; then borrowed of insurance company money for which he mortgaged other property; then, the company becoming insolvent by the great fire, he delivered up the policies and took certificate of amount of loss, which he assigned to his mortgagees. *Held*, that he could not set off these certificates against his indebtedness for the loan, but must share with the other creditors *pro rata*. *Swords v. Blake*, 3 Edw. Ch. N. Y. 112. 1838.

§ 4. The charter of the Commercial Insurance Company of New York provided that the stockholders should be individually liable for the company's debts. A subsequent New York statute provided that insolvent insurance companies might make an assignment, and in that case the creditors should have a remedy under the assignment only.

The Commercial Insurance Company, becoming insolvent, made an assignment, and certain creditors, after receiving dividends under the assignment, brought a bill to charge the stockholders individually. *Held*, that although the last named statute was void as to them, yet as they had taken the benefit of it by accepting dividends, they must be regarded as assenting to it, and were bound by its provisions; and the bill was dismissed. *Van Hook v. Whitlock*, 26 Wend. N. Y. 43. 1841.

§ 5. The mere fact of the insolvency of an insurance company at the time of issuing the policy to assured, does not authorize him to repudiate it as a contract, and claim an exemption from liability to pay the premium. There must have been an actual fraud practiced upon him by which he was deceived. *Clark v. Middleton*, 19 Mo. 53. 1853.

§ 6. The issuing of a policy of insurance by an insolvent insurance company is a good consideration for a promissory note given for the premium, if the insolvency of the company was not known by its officers or agents at the time. *Lester v. Webb*, 5 Allen, Mass. 569. 1863.

§ 7. A policy which provides that the stock and funds of the company issuing it shall be subject and liable to pay the sum assured, does not create a charge upon the stock and funds of the company so as to give a policy holder a preference over general creditors of the company. *Matter of the State Fire Ins. Co.* 1 De Gex, J. & F. Eng. Ch. 634. 1863.

See Dividends, § 4. Mutual Companies and Members, 1. Premium Notes, 8, 28. Successive Losses, 2.

INSURABLE INTEREST.

§ 1. To recover, the insured must have had an interest at the time of procuring insurance, and at the time of loss. In this case the insured took policy for seven years on a leasehold interest, which expired before the end of the seven years, and the fire occurred after the term of the lease was up, and, afterwards, the insured assigned the policy. *Held*, that insured had no interest at the time of the fire, and that plaintiff could not recover. *Sadlers Co. v. Badcock*, 1 *Wilson*, 10. 1743. S. C. 2 *Atkyn's*, 534. 1743.

§ 2. Assured was in possession of the insured property under a contract of purchase, had made a payment of interest in pursuance thereof, and had made valuable improvements, but the fee of the premises was in another. *Held*, that assured had an insurable interest in the premises. *McGivney v. Phoenix Ins. Co.* 1 *Wend. N. Y.* 85. 1828.

§ 3. A factor, who has the goods of his principal in his possession, for sale on commission, has an insurable interest in them, to the full extent of their value, and may insure them in his own name, and recover the amount payable for the loss, on an averment of interest in himself. *De Forest v. Fulton Fire Ins. Co.* 1 *Hall, N. Y.* 84. 1828.

§ 4. Any interest held under an executory contract, and while such contract subsists, is an insurable interest. *Columbian Ins. Co. v. Lawrence*, 2 *Pet. U. S.* 25. 1829.

§ 5. A party whose premises are subject to mortgage and other liens, has an insurable interest, and such interest is not divested by a sale of the equity of redemption, un-

der execution, but continues until his right to redeem expires. *Strong v. Manufacturers Ins. Co.* 10 Pick. Mass. 40. 1830.

§ 6. One in possession of a house under an executory contract, on which he has made a partial payment, has an insurable interest, and may insure it as his property without stating the particular interest he has in the premises, unless specially inquired of by the insurer. In such case a failure to state the nature of the interest to be insured is not such a misrepresentation or breach of warranty as to avoid the policy. The insured has 'an insurable interest to the full value of the house described in the policy, and that the liability of the underwriters to him is neither diminished or impaired by a previous policy, which the vendor had obtained in another company. *Tyler v. Ætna Ins. Co.* 16 Wend. N. Y. 385. 1836. *Tyler v. Ætna Ins. Co.* 12 Wend. N. Y. 507. 1834.

§ 7. Policy to secure payment of promissory note, guaranteeing payment of \$5,000, at a day fixed to bearer, on presentment at the office of the company. *Held*, that the contract was valid, and that the bearer might sue on it, as on a promissory note. *Ellicott v. United States Ins. Co.* 8 Gill & Johns. Md. 166. 1840.

§ 8. Under the code in Louisiana, the husband has such an interest and right in the personal property belonging to his wife, as authorizes him to insure it even in his own name, and without declaring the nature and extent of his interest. *Clark v. Firemen's Ins. Co.* 18 La. 431. 1841.

§ 9. A husband, who is tenant by curtesy, and has had issue born to him, has an insurable interest in the property of his wife, and may recover the whole amount of loss, not exceeding the amount insured. *Insurance Co. v. Drake*, 2 B. Monroe, Ky. 47. 1841.

§ 10. The bare possibility that a right to property might hereafter arise, cannot be considered as an insura-

ble interest. *Macarty v. Commercial Ins. Co.* 17 La. 365. 1841.

§ 11. Where the goods of the insured were levied on by the sheriff by virtue of an execution, and the sheriff took actual possession of the goods and left them in the store of assured, with doors and windows fastened up, and then went out of town, taking the key of the store with him, and during his absence a fire occurred, totally destroying them; *Held*, that the insured still had an insurable interest in the goods to their full value, and was entitled to recover. *Franklin Ins. Co. v. Findlay*, 6 Whart. Pa. 483. 1841.

§ 12. A mortgagee may insure his interest, under the charter and statute of incorporation of the Kentucky and Louisville Insurance Company. *Addison v. Louisville Ins. Co.* 7 B. Monroe, Ky. 470. 1847.

§ 13. A tenant for a year may insure his interest in the demised tenement, but is not entitled to recover the value of the building, but only the value of his lease. *Niblo v. North American Ins. Co.* 1 Sandf. N. Y. 551. 1848.

§ 14. Profits may be insured, but they must be insured as such. *Niblo v. North American Ins. Co.* 1 Sandf. N. Y. 551. 1848.

§ 15. Where the wife had an estate for years in land, and her husband erected a house upon it; *Held*, that he had an insurable interest in such house. *Abbott v. Hampden Mut. Ins. Co.* 30 Me. 414. 1849.

§ 16. One partner has an insurable interest, to the extent of his interest in the partnership, in a building purchased with partnership funds, and moved on to land owned by the other partner. *Converse v. Citizens' Mut. Ins. Co.* 10 Cush. Mass. 37. 1852.

§ 17. A mortgagee has an insurable interest in the property mortgaged. *Kellar v. Merchants' Ins. Co.* 7 La. An. 29. 1852.

§ 18. An insolvent obtained his discharge under Act 1 and 2 Vict. C. 1105, 37, and afterwards acquired property which he insured, and afterwards the discharge was revoked. *Held*, that he had an insurable interest, being in possession as apparent owner, and responsible to the real owners. *Marks v. Hamilton*, 7 Wels. Hurl. & Gord. (Exch.) 323. 1852.

§ 19. A stockholder and creditor of an unincorporated company, which erected a house on land of the State, without license or shadow of title from the State, though in possession, and claiming under a transfer from most of the stockholders to creditors, of whom he was the principal one, has not an insurable interest in such building. *Sweeney v. Franklin Ins. Co.* 20 Penn. St. 337. 1853.

§ 20. A mechanic has an insurable interest in work already done upon a house at the time the insurance is effected, payment for which is to be made upon completion of the house. *Protection Ins. Co. v. Hall*, 15 B. Monroe, Ky. 411. 1854.

§ 21. Where owner of personal property mortgaged the same, and in pursuance of an agreement with mortgagee insured the property: *Held*, 1st, that there being no evidence that payment had been demanded and the mortgagee's title become absolute, the mortgagor had an insurable interest; and, 2d, that if payment had been demanded the mortgagor would still have had an equity of redemption, which would have been sufficient to constitute an insurable interest. *Allen v. Franklin Fire Ins. Co.* 9 How. N. Y. 501. 1854.

§ 22. An agent or consignee, having the principal's property in his possession, being responsible for it, and

having a special interest in it to the amount of his commissions, may insure it in his own name, and, in case of loss, recover the full amount of the policy, holding all beyond his own interest in trust for his principals. *Ætna Ins. Co. v. Jackson*, 16 B. Monroe, Ky. 242. 1855.

§ 23. Under statute providing that a railroad company should have an insurable interest in any building or other property along the line of the road, for the loss of which by fire communicated by the engine, it was responsible in damages; *Held*, that the company had an insurable interest in growing timber three hundred feet from the line of the road. *Pratt v. Atlantic & St. Lawrence Railroad*, 42 Me. 579. 1856. See also *Hookset v. Concord Railroad*, 38 N. H. 242. 1859; *Hart v. Western Railroad*, 13 Met. Mass. 99. 1847; *Chapman v. Atlantic & St. Lawrence Railroad*, 37 Me. 92. 1854.

§ 24. The interest one acquires in a house and lot purchased at an execution sale, though no money be paid, or deed received, is insurable, if the nature of the interest has been fully disclosed to the agent of the insurer before policy was issued, although after the loss the property may have been re-sold and bought by other parties in consequence of non-payment by the assured who was first purchaser. *Ætna Ins. Co. v. Miers*, 5 Sneed, Tenn. 139. 1857.

§ 25. Assured sold a piece of property to another, and, as collateral security for the payment of \$3,500, the purchase money, received from him one bond for \$5,000, another bond for \$4,000, and a mortgage on a fulling manufactory for \$4,112, all of which were duly assigned to assured, who then effected insurance to the amount of \$2,000 on the fulling manufactory in defendant's company. *Held*, that the assured had a certain definite interest in the property insured, susceptible of being affected by loss by fire, and therefore insurable. *Sussex County Mut. Fire Ins. Co. v. Woodruff*, 2 Dutch. N. J. 541. 1857.

§ 26. Where a mortgage was given to secure such sum as the mortgagee shall hereafter advance "towards completing the buildings," and advances were re-paid, and afterwards other advances made; *Held*, that there was a subsisting liability, and that the mortgagee might recover on the policy of insurance. *Rex v. Insurance Co. 1 Philadelphia, Pa. 357. 1858.*

§ 27. A. effected insurance on a vessel in the defendant's company and assigned policy to the plaintiffs, who held a mortgage on the vessel, for \$16,000, the assignment being consented to by the company. Subsequently, he gave to C. a mortgage for \$25,000 on the same vessel, with a power to sell, on forfeiture of the condition in the mortgage. Afterwards, upon forfeiture of said condition, C. sold the vessel at public auction and himself became the purchaser. In an action on the assigned policy by the first mortgagees, or plaintiffs; *Held*, 1st, that as C. had no power to sell to himself without statutory aid, and the pretended sale, therefore, gave him no new title, but left him mortgagee still, A. holding the equity of redemption still had an insurable interest; and, 2d, that if the foreclosure of the second mortgage, had divested him of the equity of redemption, he still had an insurable interest left, in respect to the first mortgage for which he was personally holden, and was, therefore, interested in the application of the insurance money towards payment of that debt. *Buffalo Steam Engine Works v. Sun Mut. Ins. Co. 17 N. Y. 401. 1858.*

§ 28. Where the assured had contracted to purchase the property insured, and had failed in making his payment punctually, but was proceeding in equity to compel performance by the vendor who had re-sold the property to another party, the assured, however, remaining in possession; *Held*, that he had an insurable interest. *Milligan v. Equitable Ins. Co. 16 Upper Canada, Q. B. 314. 1858.*

§ 29. A husband has an insurable interest in goods settled to his wife's separate use, they residing together and sharing in the use of the property; and an insolvent retains an insurable interest in goods concealed from his creditors. To prove the value of furniture in the possession of the insured at the time of the loss, a former insurance of his furniture, renewed and kept up by him, was received in evidence. But it appearing that the furniture, &c., had been sold under an execution, except the articles included in the settlement, and the policy dropped; and that afterwards the insured becoming insolvent, stated in his schedule that he had no furniture except those articles, which he declared to be of the value of fifty pounds, his claim in respect of the same articles being upwards of two hundred pounds; this was left to the jury as evidence on a plea that the claim was fraudulent. Even where there is no fraud, the insured, on a fire policy, can only recover the real amount of the loss. *Goulstone v. Royal Ins. Co. Fost. & Fin. N. P. 276.* 1858.

§ 30. A lien on a building, acquired by furnishing materials for its construction, is an insurable interest; and the material man has a subsisting lien in the intermediate time between the furnishing of the material and the expiration of the six months, limited by the law, for filing his claim, though no claim has been filed by him. *Franklin Fire Ins. Co. v. Coates*, 14 Md. 285. 1859.

§ 31. The plaintiff, in an action on a policy of insurance, averred that at the time of effecting the policy, he was interested in the property insured; that his interest was before the loss assigned by him to one B., which assignment was accepted by defendants; and that until the loss B. continued interested, and the plaintiff as trustee for him. Defendants did not demur, but pleaded, 1st, that at the time of the loss, the plaintiff had no interest; and, 2d, that before the fire he assigned the policy to B. without having the transfer endorsed, and without defend-

ants' consent. It appeared that the statement in the declaration was true; that is, that the plaintiff had assigned his interest to B., which assignment was approved by defendants. *Held*, that the plaintiff was entitled to succeed on the issue. *Park v. Phoenix Ins. Co.* 19 Upper Canada, Q. B. 110. 1859.

§ 32. The lien of a mechanic is created by law, and is intended to be a security for the price and value of work performed and materials furnished; as such it attaches to, and exists on the land, and the building erected thereon, from the commencement of the time that the labor is being performed and the materials furnished; and the mechanic has an actual positive interest in the building anterior to the time of its recognition by the court, or the reduction of the amount due, to a judgment; and that too in such a sense, as that it is possible for it to be destroyed by fire, so that the mechanic shall lose the entire value and price of his labor and materials. Hence it is something more than a mere claim to a lien; it is *de facto* as much a lien or security before judgment, as a mortgage is a lien prior to foreclosure, and therefore an insurable interest. *Carter v. Humboldt Fire Ins. Co.* 12 Iowa, 284. 1861.

§ 33. A mechanic's lien is an insurable interest; and the judgment establishing the lien is the highest evidence of the existence of such interest, and is conclusive. *Stout v. City Fire Ins. Co. of New Haven*, 12 Iowa, 371. 1861.

§ 34. A sheriff who has goods in his custody under process has a special property giving him an insurable interest therein. *White v. Madison*, 26 N. Y. 117. 1862.

§ 35. Under a lease of vacant ground, at a nominal rent, with covenants on the part of the lessees to erect a valuable building of a permanent nature, and at the expiration of the term to surrender the premises in as good condition as reasonable use and wear will permit, damages

by the elements excepted, and with no reservation of a right to remove the building, such building belongs to the lessors, at the expiration of the term, and they then have an insurable interest therein. *Mayor &c. of New York v. Exchange Fire Ins. Co.* 9 Bosw. N. Y. 424. 1862.

§ 36. Executors, to whom real property is devised by their testator's will, have an insurable interest therein by virtue of the trust; and where the insurers issue a policy to the testator in his life-time, which does not require him to show that he was owner in fee, nor forbid an assignment of the property, and after his death they renew the insurance in favor of his executors, without inquiry or representations as to their interest, the executors may recover thereon, although before the renewal their interest has been, without the knowledge of the insurers, but in good faith, changed to a mortgage interest, by their selling the property, and taking back, at the same time, a purchase-money mortgage. *Phelps v. Gebhard Fire Ins. Co.* 9 Bosw. N. Y. 404. 1862.

§ 37. An administrator of an insolvent estate has an insurable interest in buildings belonging to it. *Herkimer v. Rice*, 27 N. Y. 163. 1863.

§ 38. In an action by the assignee of a policy to recover a loss happening after the assignment, it must affirmatively appear in the complaint that such assignee had an interest in the property insured. *Fowler v. New York Indemnity Ins. Co.* 26 N. Y. 422. 1863.

§ 39. Where a policy has been assigned with the consent of the insurer, if it is necessary that the party insured should have an interest at the time of the loss, the amount of interest or kind is not material, so that it is a subsisting interest. Thus, where the insured held certain notes secured by a mortgage upon a house which he procured to be insured, and he afterwards, and before

the loss occurred, assigned the notes and mortgage and the policy, with the assent of the insurers, the ultimate liability of the insured upon his assignment of the notes, and his consequent interest in having the insurance money go to the satisfaction of these notes in the hands of his assignee, is a sufficient interest to sustain the policy and to authorize him to sue in his own name for a recovery of the insurance money. *New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221. 1863.

§ 40. The assignee of a bond conditioned for the conveyance of real estate, upon which valuable improvements have been made by the obligee, has an insurable interest in the property therein described. *Sayres v. Hartford Fire Ins. Co.* 17 Iowa, 176. 1864.

§ 41. Where a policy of insurance, issued to the plaintiff by an agent since May 1, 1861, bore upon its face the name of such agent, and no written application was made; but the agent examined the premises and was fully informed of the state of the title of the insured; and one of the conditions of the policy, which, by its terms, was made a part thereof, was that "if the property to be insured be held in trust or on commission, or be a leasehold, or other interest not absolute, it must be so represented to the company, and expressed in the policy, in writing, otherwise the insurance, as to such property, shall be void; "and the interest of the insured was in fact that of mortgagee, but that fact, or that his interest as such, was to be insured, did not appear in the policy; *Held*, that, if there be an error in the description of the interest of the insured in the policy, it is imputable to the defendant's agent, and the policy is not void by reason thereof; and, that if there had been a misrepresentation as to the interest of the insured, it would not prevent a recovery to the full amount of the interest insurable, unless such misrepresentation was fraudulent. *Emery v. Piscataqua Fire & Marine Ins. Co.* 52 Me. 322. 1864.

§ 42. A lease, executed by the mayor &c. of New

York to R. and others, was upon the condition that the lessees should erect upon the demised premises such a building as was described in a certain petition and resolution; and at the expiration of the term quit and surrender the premises in as good state and condition as reasonable use and wear thereof would permit. The rent reserved was nominal only. *Held*, that the future ownership by the lessors of the building to be erected by the lessees, was in the contemplation of the parties at the time the lease was executed; and that at the expiration of the term the lessors became the owners of the superstructure which had been erected in pursuance of the conditions of the lease, and had an insurable interest therein. That the lessors having been in possession of the building erected by the lessees, under a claim of ownership, at the time of procuring an insurance by them upon the same, the insurers could not be allowed, in an action on the policy, to dispute the lessors' interest in the building; even if the title was acquired by an act constituting a trespass as against the lessees, or their receiver. *Mayor &c. of New York v. Brooklyn Ins. Co.* 41 Barb. N. Y. 231. 1864.

§ 43. Where the insured has no interest in the property at the time of the loss, the policy is void, although the loss is by the terms of the policy made payable to a third person, and such third person at the time of the loss has an interest in the property. *Tallman v. Atlantic Fire & Marine Ins. Co.* 29 How. N. Y. 71. 1865.

§ 44. A policy of insurance upon the interest of a "mortgagee in possession," in a building "occupied by a tenant," is valid, although another person was in the occupation of the premises under an agreement from the assured to convey the same to him. *Davis v. Quincy Mut. Fire Ins. Co.* 10 Allen, Mass. 113. 1865.

§ 45. A husband, as tenant by the curtesy of the

real estate of his wife, may effect a valid insurance thereon, in his own name. *Harris v. York Mut. Ins. Co.* 50 Penn. St. 341. 1865.

§ 46. A mechanic's lien is an insurable interest. *Longhurst v. Star Ins. Co.* 19 Iowa, 364. 1865.

§ 47. The plaintiffs, being the owners of certain premises, leased the same to C. who, by the terms of his lease, agreed to pay the necessary premium to enable the lessors to keep the premises insured for their own benefit, to the amount of \$5,000. At the execution of this lease there was a policy on the property. When it expired, C. asked leave to change the company, and agreed verbally to keep the property insured, for the lessors, to the extent of \$5,000. He thereupon took out the policy in suit, insuring "his" (C.'s) building; "loss, if any, payable to L," one of the lessors, who was acting trustee for the property.

Held, that the agreement of C. to keep the property insured for the lessors, to the extent of \$5,000, made him liable to the lessors for a breach of that agreement, and gave him an insurable interest in the property to that extent.

That as he had an insurable interest, the property was his for the purpose of indemnity, to the amount of his interest; and he could insure that interest. *Lawrence v. St. Mark's Fire Ins. Co.* 43 Barb. N. Y. 479. 1865.

§ 48. One of five trustees of a church effected an insurance upon the church building in his individual name. The policy provided that in case of loss the amount should be paid to a creditor of the insuring trustee, to whom, however, the church was not indebted. The premium was paid by the insuring trustee out of his own funds, but on account of the parish, and with the assent of the other trustees. *Held*, that the company was liable upon the policy, it being a matter immaterial to the company

(supposing the risk to be the same) whether the person appointed by the insuring trustee to receive the money retained it to his own use or paid it to the trustees. A trustee, as such, has an insurable interest in the trust property. *Insurance Co. v. Chase*, 5 Wall. S. Ct. U. S. 509. 1866.

See Assignment, § 43. Evidence, 70. Fraud, 13. Goods in Trust or on Commission, 4. Illegality of Contract, 10. Parol Evidence, 11. Re-Insurance, 3. Renewal of Policy, 7.

INSURANCE COMPANIES.

§ 1. An insurance company does not forfeit its charter because of non-user, by refusing to insure against extra hazardous risks. *Corwin v. Urbana & Champaign County Mut. Ins. Co.* 14 Ohio, 6. 1846.

§ 2. In a company whose business is conducted by the president, vice-president and secretary, subject to the direction of a board of trustees, the secretary being empowered verbally by the president and vice-president, with the knowledge of the trustees, to indorse the premium notes of the company, is thereby authorized to transfer the title of a note indorsed by him. *Leary v. Blanchard*, 48 Me. 269. 1860.

§ 3. In an action against the maker, by the indorsee of a note, given to an insurance company, and by them transferred in payment for bank stock purchased by them, the defendant cannot controvert the right of the company to purchase the stock. *Brown v. Donnell*, 49 Me. 421. 1860.

§ 4. An insurance company which is authorized by its charter "to loan its funds and moneys" to individuals or public corporations, on real or personal security, but is prohibited from using the same "in the trade or business of exchange or money brokers," may lawfully purchase a bill of exchange drawn on and accepted by third persons, if it was bought in good faith, either as an investment, or to collect a debt previously due to said company. *White's Bank of Buffalo v. Toledo Fire & Marine Ins. Co.* 12 Ohio St. 601. 1861.

§ 5. Insurance companies in Illinois are prohibited by statute from interposing the defence of usury. *Hartford Fire Ins. Co. v. Hadden*, 28 Ill. 260. 1862.

§ 6. An insurance company, chartered in 1836, was authorized by its charter to insure at such rates and upon such proportion of premium notes and of cash premium as the directors should determine. And the board of directors was required, from time to time, to fix and determine the rates of insurance, the sum to be insured, and the amount of premium notes and money to be paid for any insurance. In 1851 the company extended its charter, under the act of 1849, and changed its corporate name. The act of June 25, 1853, relative to the incorporation of insurance companies, provides that all companies incorporated or extended under the act of 1849, "are hereby brought under the provisions of this act, except that their capital may continue of the amount named in their charters, &c., and are also entitled to all the privileges granted by said charters." *Held*, that the right of the directors to determine the amount of cash premium to be paid at the time of the insurance, was a "privilege granted" by the charter, and was therefore expressly excepted by the act of 1853 from the operation of its provisions. *Hyatt v. Whipple*, 37 Barb. N. Y. 595. 1862.

§ 7. The knowledge that an officer of an insurance company acquires by rumor, or by information received in

his individual capacity, cannot be regarded as constructive notice to the company. The notice should be given by one having authority for that purpose, to some one having authority to receive it. *Keenan v. Dubuque Mut. Fire Ins. Co.* 13 Iowa, 375. 1862.

§ 8. Insurance companies, without any special authority for that purpose, possess the incidental power to borrow money, and this includes the power to obtain indorsers or sureties, and to secure them by a transfer of assets; and it is immaterial whether such transfer is directly to the indorsers, or to trustees for their benefit. *Nelson v. Eaton*, 16 Abb. Pr. 113. 1863.

INTEREST IN POLICY.

§ 1. Whether lessee of a house, who is under covenants to repair, accidents by fire excepted, the house being burnt down, and lessor, who had insured, having received the insurance money, but neglected to rebuild, is entitled to an injunction, till the house is rebuilt, against an action at law brought by the lessor for rent, *quære*. *Brown v. Quilter*, 2 Eden Ch. 219. 1763.

§ 2. A being entrusted with goods belonging to B, undertook to get them insured. He afterwards effected an insurance in his own name upon property on his premises, but without making any mention of goods "held in trust." The premises were destroyed by fire, and A received the amount of his insurance, which fell considerably short of his own loss. *Held*, that no part of this money could be considered as received on account of B, and that it could not therefore be set off in an action for work and labor brought by A against B. *Gillet v. Mawman*, 1 Taunt. 136. 1808.

§ 3. Insurance on house, of which insured was seized in fee, in a mutual association, one of whose articles provided that in case of the death of a member, his interest should survive to his executors, administrators, or assigns, who should be possessed of the policy. The insured died and the premises descended to the heir, and afterwards the fire occurred. *Held*, that no person could have the benefit of the policy but the personal representative, who could not be made a trustee, and that bill by the heir would not lie. *Mildmay v. Folgham*, 3 Ves. 471. 1797.

§ 4. Policy to firm of two, on property used by the firm but owned by one of the partners. After the fire, a joint commission issued against the two, and they were declared bankrupts, and their assignees received the insurance money. The separate creditors of the partner owning the property insured declared entitled to the money, and the case not within 21 Jac. 1, C. 19, Sec. 10 and 11. *Exp. Smith*, 1 Buck, C. B. 149. 1818.

§ 5. A tenant has no equity to compel his landlord to expend money received from an insurance office, on the demised premises being burnt down, in rebuilding the premises, or to restrain the landlord from suing for the rent until the premises are rebuilt. *Leeds v. Cheetham*, 1 Simons, Ch. 146. 1827.

§ 6. P took a policy on a house, and died, devising the same, subject to a charge, in favor of A, whom he appointed administratrix. A, while administratrix, renewed the policy, and during the renewed term, the house burned. *Held*, that as A renewed the policy while administratrix, she must be deemed to have renewed as administratrix; and that the proceeds of insurance were of the personal estate, but subject to a trust in favor of those interested in the real estate. *Parry v. Ashley*, 3 Simons, Ch. 97. 1829.

§ 7. Tenant of distillery, being entitled under his lease to make new erections, and to remove them at expiration of lease unless taken by the landlord at a valuation, and having made such erections, and taken a policy on them for less than their value, and on his stock, &c., for other sums, and the entire property being consumed; *Held*, 1st, that the landlord was not entitled to claim from the insurance office, as an arresting creditor of the tenant, any part of the value of buildings consumed; but, 2d, that he was entitled to claim for rents due prior, but not posterior, to the fire. *Scottish Union Ins. Co. v. Mackintosh*, 9 Cases in the Court of Sessions, 310. 1831.

§ 8. A had goods deposited with him by B. A loss occurred, and A made claim for A and B's goods, and gave memorandum to B, agreeing to pay his proportion of insurance, when ascertained. *Held*, that A could not show by parol evidence that he intended by such memorandum to account only for what remained, after his own loss had been made up; that B was entitled to receive of insurance money, in proportion of the value of his goods to the whole loss, and that instructions from B to A, to insure, were not necessary to enable him to recover. *Durand v. Thouron*, 1 Port. Ala. 238. 1834. *Watkins v. Durand*, 1 Port. Ala. 251. 1834.

§ 9. Where covenant is made by mortgagor to keep premises insured, and to apply money to rebuilding, in case of loss, for benefit of mortgagee, a court of equity would regard mortgagor as the trustee, if he received the insurance money, and coerce such application of the money, and so with the legal representatives of mortgagor; and, if the property, after its destruction by fire, has been sold, and did not pay the mortgaged debt, and its rebuilding is impossible in consequence of such sale, yet still the mortgagee would be entitled to be paid out of the insurance money, in preference to the general creditors or his representatives. *Thomas v. Von Kapf*, 6 Gill & Johns. Md. 372. 1834.

§ 10. Where property, shipped from New Orleans to Liverpool, insured by the owners in London about the time of the shipment, and soon after re-landed, and stored, and insured by the factors in New Orleans against fire "for all whom it may concern," was destroyed by fire, and the London office paid on the first policy; *Held*, that the latter could not claim indemnity from the New Orleans office, unless the transaction amounted to a re-insurance; that it was not a re-insurance, because no special authority had been given, nor had there been any subsequent ratification of their acts by the plaintiffs before the loss happened. *Alliance Marine Assurance Co. v. Louisiana State Ins. Co.* 8 La. 1. 1835.

§ 11. The assignee of the policies in this case, who was mortgagee, obtained judgment on the policies in the name of the mortgagor, and was afterwards paid the amount of the debt due him by the mortgagor. The latter then gave the company notice of the payment, and that he claimed to be owner of the judgment by operation of law. The company then instituted proceedings for a vacation of the judgment. While the policies were in the hands of the assignee, the assignor had obtained other insurance without notice; and although it was held that this act was not available as a defense to an action on said policies for the benefit of the assignee, (see *Responsibility of Assignee for Acts of Assignor*, § 4,) it was claimed that the company was entitled to the benefit of the point now. *Held*, that the judgment was conclusive of the liability of the company, and plaintiff might buy it as well as anybody else; and that, it being entered in his name, the payment of the mortgage brought back to him the whole interest, as effectually as it could have been done by assignment. The case of *Traders' Insurance Co. v. Roberts*, 9 Wend. 474, reversed. *Roberts v. Traders' Ins. Co.* 17 Wend. N. Y. 631. 1836.

§ 12. Chancery has no power to decree to mortgagees the proceeds of a policy of insurance, effected by the

mortgagor on the mortgaged property, where the same has been destroyed by fire, and no covenant exists in the deed as to insurance. *Vandegraaf v. Medlock*, 3 Port. Ala. 389. 1836.

§ 13. There is no principle of law or equity by which a mortgagee has a right to claim the benefit of a policy underwritten for the mortgagor, on the mortgaged property. *Columbian Ins. Co. v. Lawrence*, 10 Pet. U. S. 507. 1836.

§ 14. S. took a policy to himself, his heirs and assigns, and afterwards died, devising certain premises, including the building insured, to his widow for life, and remainder to his infant daughters. The widow married one H., and afterwards the building insured was destroyed by fire. Upon suit brought the insurance company was decreed to pay the insurance money to H. and wife, upon their giving bond to pay the amount received to the infants at the death of S.'s widow, and the money was paid and a bond was executed accordingly, and the money was expended in rebuilding the house. After the death of the widow, the daughters with their husbands brought an action at law on the bond and recovered judgment against the surviving obligor, whereupon he exhibited his bill to enjoin the proceedings. *Held*, 1st, that the action of the court requiring the execution of bond, before payment of the insurance money to H. and wife, was correct, and, even if erroneous, could not then be impeached; 2d, that under the provisions of this policy, it passed on the death of S. to his devisees in the proportion of their interests in the premises, and not to his administrator; 3d, that independent of the bond, the right to the insurance money at the death of the widow became vested in the daughters, and, upon their marriage, in their husbands; and there existed no rule in equity requiring or authorizing the application of the money to rebuilding the house without their consent; and the fact that the money was so applied, and that the house, so rebuilt, went as part of the realty

to the daughters on the death of the widow, did not in any way affect the right to demand the money notwithstanding. Injunction refused. *Haxall v. Shippen*, 10 Leigh, Va. 536. 1839.

§ 15. B. agreed to effect insurance on property of W, and did so in his own name, informing W. that he had effected insurance for his benefit under the agreement. *Held*, that W. had such an equitable interest in the policy, that he was entitled to the insurance money as against an attaching creditor of B. *Providence County Bank v. Benson*, 24 Pick. Mass. 204. 1840.

§ 16. A mere lien upon the property insured does not give to the holder of that lien a corresponding claim upon the policy which the owner of the property has obtained for the protection of his own interest therein; although the assured is personally liable to pay the debt, which is a lien upon the property insured. *Carter v. Rocket*, 8 Paige, N. Y. 437. 1840.

§ 17. The contract of insurance does not run with the land, and the grantee of a conveyance made of the property insured acquires no interest in the policy or its proceeds. *Wilson v. Hill*, 3 Met. Mass. 66. 1841.

§ 18. In a partition suit in equity, A. was one of several heirs, and co-tenant in common, and bid off the premises at a master's sale. The premises were insured in the names of all the heirs, and, after confirmation of the sale, and before A. received the deed, the house bid off was destroyed by fire; *Held*, that A. was the legal owner of the house, and entitled to the benefit of the policy. *Gates v. Smith*, 4 Edw. Ch. N. Y. 702. 1846.

§ 19. Title, after insurance, became divided between tenant for life and reversioner, when fire occurred, injuring but not destroying the building. *Held*, that either party

might insist on application of insurance money to repairs, and the tenant for life having made the repairs, her bill against reversioner and insurance company to have the money paid her unconditionally was sustained. *Haxall v. Shippen*, 10 Leigh, 536, construed. *Brough v. Higgins*, 2 Gratt. Va. 408. 1846.

§ 20. A., a manufacturer, contracted with B., C. and D., who were partners, occupying a mill, the property of B., for the drying of his wool in a room in the mill. B., C. and D. effected an insurance on the mill, covering wool in the room. D. retired from the partnership, after which C. and D. had no interest in the room. B. and C. effected another insurance, also covering goods in the room. A dissolution of partnership took place between B. and C., which was not communicated to A. C. afterwards effected an insurance in his sole name, and A.'s wool being damaged by fire, the insurance office paid the proceeds from sale of damaged wool to A., and the balance, to the amount insured thereon, to C. Similar losses had been paid by the partnership to A. under former policies. *Held*, that, as it was not shown that B. had authorized the effecting of the then policy, or that the partnership was bound to insure, an action for money had and received could not be maintained by A. against B. and C. jointly. *Armitage v. Winterbottom*, 1 Man. & Grang. 130. (30 E. C. L. 379.) 1840.

§ 21. Where an insurance was made by a lessor, who had entered premises for arrears under covenants in the lease, and, upon destruction of the property, received the amount insured; *Held*, that the sub-lessees might recover from him, on proving that the insurance was made on their interest, without showing a previous request to make the insurance, or a subsequent adoption of it, until after the fire. *Miltenberger v. Beacom*, 9 Penn. St. 198. 1848.

§ 22. Where lessor entered for arrears, under a cove-

nant to hold until arrears were paid, and stated an account with sub-lessees of the rents received, in which he charged them premiums of insurance on the property, and they objected to the account generally; *Held*, a question for the jury, in an action by the sub-lessees against the lessor to recover the insurance received by him on such property, whether the lessor intended the insurance to cover his own or their interest. *Miltenberger v. Beacom*, 9 Penn. St. 198. 1848.

§ 23. Where mortgagees took possession of premises for condition broken; and whilst in possession took out policies of insurance in their own name and for their own benefit, under which they received twenty-five dollars for loss and damage; *Held*, on a bill in equity for the redemption of such premises, that the mortgagor was not entitled to this sum received by the mortgagees. *White v. Brown*, 2 Cush. Mass. 412. 1848.

§ 24. The American Mutual Insurance Company insured the plaintiffs \$22,000 upon merchandise in New York, and afterwards caused itself to be re-insured to the amount of \$10,000 by the Mutual Safety Insurance Company, upon the same risk. During the running of these policies the property was destroyed by fire, and the American Mutual Insurance Company rendered insolvent thereby. *Held*, that the plaintiffs had no equitable lien, or preferable claim, upon the fund of \$10,000, due upon the re-assurance, as that fund belonged to all the creditors of the insolvent company, ratably. *Herckenrath v. American Ins. Co.* 3 Barb. Ch. N. Y. 63. 1848.

§ 25. Where mortgagor effected insurance, and assigned policy to mortgagee, and mortgagee recovered from insurance company more than enough to pay his debt, *Held*, that as to the balance he was trustee of the mortgagor. *Smith v. Packard*, 19 N. H. 575. 1849.

§ 26. Warehousemen, who were also members of a transportation company, after making an insurance for the benefit of the transportation line on "merchandise generally" contained in their warehouse, received a lot of cotton, in the receipt or bill of lading, for which it was specified that the dangers of navigation, fire, &c., were excepted. The consignees of the same without request from the consignors, had previously effected insurance on other portions of the same lot of cotton, but not on the lot last received. A portion of the last lot was destroyed by fire in the warehouse aforesaid, soon after its receipt, and before notice to the consignees of its arrival. *Held*, that such insurance by the warehousemen, being made for the benefit of the carriers, did not enure to the benefit of the owners of the cotton. *Steele v. Franklin Fire Ins. Co.* 17 Penn. St. 290. 1851.

§ 27. An insurance upon "merchandise generally, in a certain warehouse, for whom it may concern," protects only such interests as were intended to be insured at the time of the execution of the policy, and the burden of proving that his property was intended to be protected, rests upon him who asserts it; and it will not be sufficient to prove that it was known generally, that the insurance in question, made by the warehousemen, in whose store the property was destroyed by fire, was for the benefit of all their customers, whether as a warehouse firm, or as members of the transportation line, which delivered the property in question. *Steele v. Franklin Fire Ins. Co.* 17 Penn. St. 290. 1851.

§ 28. A purchaser of an equity of redemption insured the property in his own name and for his own benefit, and received the insurance money within the year, upon the destruction of the property; *Held*, on a bill to redeem, that the mortgagor was not entitled to have the insurance money so paid applied in extinguishment of his debt. *Cushing v. Thompson*, 34 Me. 496. 1852.

§ 29. By an order of the Court of Chancery, the receiver of certain real estates was directed to pay certain fire insurances on them; and, by a subsequent decree, it was declared that H. was tenant in tail in possession of real estates, and the receiver was directed to pay the balances to the account of H., and, a fire having taken place; *Held*, that H. was entitled to the insurance money. *Seymour v. Vernon*, 10 Eng. Law & Eq. 40; 16 Jur. 189. 1852.

§ 30. Policy to A. & Co., though there was no such firm at the time of its execution, but B. was heir at law of a former partner of A., then dead; *Held*, 1st, that B. had no interest in the policy, and A., if the policy was good as to his interest, could not sue jointly with B.; and, 2d, that parol testimony to show, that the insurance company was apprised of the state of the title, when the policy was made, was inadmissible. *Work v. Merchants' & Farmers' Mut. Fire Ins. Co.* 11 Cush. Mass. 271. 1853.

§ 31. Where a lessee covenants to erect on the leasehold premises a building worth a specified sum, and to keep the premises insured, and after the building is erected the builder obtains a decree in a court of chancery upon his contract of building, under which decree he enters into possession of the premises without a sale, his possession is unauthorized and permissive only, and does not make him an assignee of the lease, so as to render him liable on the covenants contained in it. And if the builder, while thus in possession, insure the premises to the extent of his interest in the lease, the policy does not enure to the benefit of the lessor or his assigns, nor does it make the builder liable on the covenant of insurance contained in the lease. *Merchants' Ins. Co. v. Masange*, 22 Ala. 168. 1853.

§ 32. The interest of the vendor of real property, in a policy of insurance against fire, effected by the vendor previous to the sale, passes by operation of law to the

purchaser, the sale being notified to the company ; and a payment made by the insurance company to the vendor, on a loss occurring after the sale, of a sum greater than the balance of the purchase money remaining unpaid, ensures to the benefit of the purchaser as a discharge from such balance. *Le Claire v. Crapser*, 5 Lower Canada, S. C. Montreal, 487. 1853.

§ 33. Action cannot be maintained to recover money received by the defendant from an insurance company under a policy effected by him in his own name on certain property, some of which belonged to the plaintiffs ; when the money was not received, either in whole or in part, on account of plaintiff's property, and their property was not in fact covered by the policy. *Turner v. Stetts*, 28 Ala. 420. 1856.

§ 34. Where property insured by the vendor was sold, and the policy not assigned to the vendee, the latter cannot, after a loss, recover from the vendor the amount of insurance collected by him. *King v. Preston*, 11 La. An. 95. 1856.

§ 35. A testator gave his personal estate to his widow, and devised his real estate to his executors in trust. At the time of his decease, there was an outstanding policy of insurance against loss by fire, on some buildings owned by the testator, and after his death a loss occurred, and the amount of damage was paid to the executors under the policy. The widow claimed this sum as a part of the personal estate. *Held*, that the money from such insurance must be taken and held by the executors, upon the same trusts as those upon which they held the subject matter itself, and that the widow had no such interest as to entitle her to the money. *Eagle v. Emmett*, 4 Bradford, (Surrogate Court, N. Y.) 117. 1856.

§ 36. If, upon a general survey of the provisions of the policy, and the circumstances under which it was pro-

cured, it appears that the intention of the company was to insure, for the benefit of any person, an interest not named, the common interest of the parties will not be defeated for the want of technical or even customary phrases; if on the other hand the most natural construction of the policy is that the party named as the assured only sought to protect his own interest, the contract is not to be extended so as to cover the interest of a third person. *Duncan v. Sun Mut. Ins. Co.* 12 La. An. 486. 1857.

§ 37. L. purchased a lot of sugars from M., and paid \$8,000, on account, leaving the sugars in the store of M. until he was ready to take them away. He then effected insurance upon them in his own name, and this action was brought to recover of M. the premium for the same, and other expenses; *Held*, that the property, before it was weighed or delivered, was at the risk of M., and L. could not insure it for him, and was not therefore entitled to recover from M. the premium, paid by him, for the insurance. *Orguerre v. Luling*, 1 Hilton, N. Y. 383. 1857.

§ 38. If mortgagee insures with his own funds, for his own exclusive benefit, the insurance money paid on the loss is not in discharge of the mortgage; but if he insures at the request, and for the benefit of the mortgagor, as well as himself, the money paid is in discharge of the mortgage indebtedness. *Concord Mut. Fire Ins. Co. v. Woodbury*, 45 Me. 447. 1858.

§ 39. An executory agreement, by the mortgagor, to insure for the benefit of the mortgagee, gives to the latter an equitable lien upon the money due upon the policy, taken out by the former, on the mortgaged premises, in his own name, to the extent of the interest of the mortgagee therein, which a court of equity will enforce to the satisfaction of the amount due upon the mortgage. *Nicols v. Baxter*, 5 R. I. 491. 1858.

§ 40. The deposit of a policy of insurance with a creditor of the assured, as security for the debt, collateral or original, gives the creditor a lien on the proceeds of the policy, which lien is binding upon the underwriters and upon the insured, and upon all those who take an interest from the assured, with notice of such lien. *Ellis v. Kreutinger*, 27 Mo. 311. 1858.

§ 41. A manufacturer of clothing effected insurance on his own goods and "goods held by him in trust." When the loss occurred he made claim for and received of the insurers payment of his own goods only, which were of a greater value than the sum insured. Another party who had left cloth with assured to be manufactured, then claimed of assured a portion of the insurance money received by him; but it appearing that he had not adopted or ratified the insurance made by assured, that he did not even know of its existence until after the loss, and until after the assured had made claim for the loss of his own goods only; *Held*, that under the circumstances the assured alone were entitled to the money received; that their election to claim for the loss of their own goods only, was equivalent to an election to cancel so much of the policy as purported to insure goods "held by them in trust," which they were at entire liberty to do. *Stillwell v. Staples*, 19 N. Y. 401. 1859. Reversing 6 Duer, N. Y. 63, 1856, on this point.

§ 42. Policies of insurance are not deemed, in their nature, incidents to the property insured; and do not cover any interest which a person other than the insured may have in the property, as heir, grantee, mortgagee or creditor, unless there be a valid assignment of the policy. *Wyman v. Prosser*, 36 Barb. N. Y. 368. 1862.

§ 43. A contract of insurance, being a mere personal contract, in no way attached to or running with real property that may be insured, does not pass with such property either to a grantee or an heir. The executor or admin-

istrator is the only one who can take the contract and enforce it. *Wyman v. Prosser*, 36 Barb. N. Y. 368. 1862.

§ 44. Where a policy is procured by the insured for their own protection, and in respect to property in which they claim an ownership, they may recover thereon, although it is expressed to be for account of whom it may concern. *Mayor &c. of N. Y. v. Hamilton Fire Ins. Co.* 10 Bosw. N. Y. 537. 1863.

§ 45. Where a person who has effected an insurance against fire upon his house, dies, the interest in the policy devolves upon his heirs-at-law, and in case of loss the damages accrue to them. *Wyman v. Wyman*, 26 N. Y. 117. 1863.

§ 46. Where the plaintiffs, as mortgagees, procure a policy on their interest in the mortgaged property, and the policy contains the usual apportionment provision, and a subsequent mortgagee procures an insurance in another company on the same property, the plaintiffs, in case of loss, are not liable to be apportioned with such subsequent mortgagee, but are entitled to recover the whole amount insured by them, being less than the loss or damage to the property. *Fox v. Phenix Fire Ins. Co.* 52 Me. 333. 1864.

§ 47. Where a policy, when made, covers the interest of one partner only, the remaining interest cannot be brought within it by the partner insured subsequently becoming the owner of the whole. *Peoria Marine & Fire Ins. Co. v. Hall*, 12 Mich. 202. 1864.

§ 48. An agent may effect an insurance in his own name for the benefit of the owner, without giving the name of the owner of the goods, but the words of the policy must sufficiently indicate such intention. The word "agent" attached to the name of the person assured, imports that he is acting for an undisclosed principal; and

parol evidence is admissible in such case to show for whose benefit the insurance is effected. *Plahto v. Merchants' & Manufacturers' Ins. Co.* 38 Mo. 248. 1866.

§ 49. A mortgagee of a building whose interest therein is insured by a policy which provides that, in case of payment of any loss to him, he shall assign to the company so much of his interest in the mortgage as may not be necessary to extinguish the residue of the debt due thereon, may recover the full amount insured, although before the date of the policy he had entered into a written agreement to convey the premises insured to a person who, by the terms of the same agreement, was to be at the expense and have the benefit of the insurance, and who, after the date of the policy and before the loss, had recognized the policy by paying the expense thereof. *Davis v. Quincy Mut. Fire Ins. Co.* 10 Allen, Mass. 113. 1865.

See Alienation, § 40, 51. Assignments, 39, 40. Covenants to Insure, 5. Goods in Trust or on Commission, 5, 12. Mortgagor and Mortgagee, 4. Re-Insurance, 8. Who May Sue, 28.

LIEN.

§ 1. Under statute of Virginia of 1794, property continues liable to assessments after it has passed into the hands of a *bona fide* purchaser. And this lien is not affected by cession of District of Columbia to United States. *Mutual Assurance Society v. Watts*, 1 Wheat. U. S. 279. 1816.

§ 2. The lien for quotas in the Mutual Assurance Society of Virginia, for insurance on buildings in Alexandria, was not affected by the separation of Alexandria from Virginia, but continued on such buildings in District

of Columbia. The liability of assured for assessments does not cease in consequence of forfeiture of his policy, by his own neglect; and under the regulations of the society he is liable for an extra premium, because of increased hazard. *Korn v. Mutual Assurance Society*, 6 Cranch, U. S. 192, and 7 Cranch, U. S. 396. 1801. See also, *Atkinson v. Mutual Assurance Society*, 6 Cranch, U. S. 202. 1801.

§ 3. A lien for quotas under act of 1794, and for additional premiums under act of 1805, and for contributions under acts of 1809 and 1819, of Virginia, attaches to and follows the property insured, in hands of purchaser, without notice. *Mutual Assurance Society v. Stone*, 3 Leigh, Va. 218. 1821.

§ 4. Under the law of Virginia touching the Mutual Assurance Society, after the death of a member, his heirs are liable for contributions till dower is set off, then the widow is liable until she parts with her life estate, but if she conveys away her life estate, the purchaser is liable after the purchase. None are personally liable except for contributions accruing during the time they hold the property, but a lien for all contributions, with interest, exists against the entire property, but not for damages. In case of sale, however, a division of what is due should be made between the several parties interested, with reference to the settlement of accounts between them. *Shirley v. Mutual Assurance Society*, 2 Rob. Va. 705. 1844.

§ 5. Bill to enforce company's lien against heirs of assured, nothing being due at his death. Descent, held to be an "alienation" within the meaning of the charter which divested the lien, and bill dismissed. *Indiana Mut. Fire Ins. Co. v. Chamberlain*, 8 Blackf. Ind. 150. 1846.

§ 6. Alienation of property insured, by deed or mortgage, destroys company's lien for payment of premium

note. *McCulloch v. Indiana Mut. Fire Ins. Co.* 8 Blackf. Ind. 50. 1846. *Indiana Mut. Fire Ins. Co. v. Coquillard*, 2 Cart. Ind. 645. 1851.

§ 7. The plaintiffs were a company existing in, and chartered by, the State of New York, for the purpose of carrying on the business of a mutual insurance in the county of Genessee. Their charter provided that the company should have a lien by way of mortgage on the property insured, and upon the right, title and interest of the assured to the land upon which such property stood.

The defendant was a British subject, residing in Canada, and the contract was entered into in Canada. *Held*, that the company, from the very nature and objects of its charter, was incapable of carrying on its business in this province; and that a foreign legislature could make no law creating a lien on legal estate in Canada, and consequently that any contract founded on such a consideration was void *ab initio*. *Genessee Mut. Ins. Co. v. Westman*, 8 Upper Canada, Q. B. 487. 1851.

§ 8. A judgment which is limited in its effect, and does not extend to the insured property, is not a "lien" within the meaning of the interrogatory relative to encumbrances, and will not avoid a policy of insurance which issued upon a negative answer by the party insured to such interrogatory. *Somerset Ins. Co. v. McAnally*, 46 Penn. St. 41. 1863.

See Dependency of Policy and Premium Note, § 14. Dividends, 2.

LIGHTNING.

§ 1. The act of incorporation constituted certain persons a body politic, "for the purpose of insuring their respective dwelling houses, with their contents, against loss or damage by fire, whether the same shall happen by accident, lightning, or by any other means, &c.; and by the terms of the policy the company were to pay within a specified time after the property should be burnt, destroyed, or demolished, "by reason or by means of fire;" *Held*, that a damage caused by lightning only, without any combustion, was not a loss within the policy. *Keniston v. Merrimack County Mut. Ins. Co.* 14 N. H. 341. 1843.

§ 2. Where policy insured against fire generally, and a separate clause declared that the insurers would be liable for fire by lightning; *Held*, that the company was not liable where a house was only rent and torn to pieces by lightning without being ignited or any actual combustion taking place; the insurance being against fire in the ordinary and popular meaning of the term. *Babcock v. Montgomery County Mut. Ins. Co.* 6 Barb. N. Y. 637. 1849. Affirmed, 4 Comst. N. Y. 326. 1850.

§ 3. A corporation, authorized by its charter to insure against fire, whether caused by "accident, lightning, or any other means," cannot insure against damage by lightning, not resulting in fire, although their by-laws provide for their so doing. Such an insurance would be beyond the corporate authority. *Andrews v. Union Mut. Ins. Co.* 37 Me. 256. 1854.

LIMITATION CLAUSE.

§ 1. Bill in equity to recover the amount of a policy of insurance. Policy provided that no suit or action in law or chancery shall be sustained, unless commenced within twelve months after the cause of action shall accrue. *Held*, that the stipulation went to the right, as well as the remedy; and the liability of the company did not become absolute, unless the remedy was sought within the period limited; and that a plea of the same was a conclusive answer to the suit. *Cray v. Hartford Fire Ins. Co.* 1 Blatchf. C. C. U. S. 280. 1848.

§ 2. By the fifteenth condition annexed to the policy, it was declared "that no suit or action of any kind against the insurers for the recovery of any claim under the policy, should be sustained in any court of law or chancery, unless such suit or action should be commenced within the term of twelve months next after the cause of action accrued," &c. *Held*, that this was a condition subsequent—the subject of a plea; that an allegation in a count upon a policy, containing this condition, that the insurers had no mayor, president, &c., upon whom process could be served, was mere surplusage. This condition being the subject of a plea, an averment in the declaration that the insurers had waived it, would not be traversable; therefore, it might be passed by without notice. *Held* also, that it could not be waived—that lapse of time extinguished the liability of the insurers, which could not be revived by a waiver; but *semble*, that they might dispense with the condition by deed, and if a deed could avail as a dispensation, it should be replied to a plea of the condition. *Held* also, that the condition was valid in law, and operated as an effectual bar everywhere; therefore, a plea of the fifteenth condition, to a count containing an averment of waiver of this condition, was properly plead-

ed. A replication to such a plea, that the defendants were a foreign corporation, and that no action could have been sustained within the twelve months unless they had voluntarily appeared, and there was no means of compelling their appearance, although the plaintiff was willing to prosecute within the twelve months, was bad, as it neither confesses nor avoids anything material, for the plaintiff might have sued out process within the twelve months, or the defendants might have been sued in the country where they were incorporated, and they were not estopped, by voluntarily appearing, from setting up a lapse of time as a defense. *Ketchum v. Protection Ins. Co.* 1 Allen, N. B. 136. 1848.

§ 3. Williams and Bliss were insured jointly. The directors refused to pay the loss, on the ground that Williams was indicted for setting fire to the property. Afterwards the directors voted to pay Bliss his share of the loss on the ground that he was not implicated in the fraud. The charter provided, that unless suit was brought within a certain time after the determination of the directors, the claim should be barred. The time within which suit must be brought had elapsed, counting from the time of the first determination of the directors not to pay, but had not elapsed from the time of the allowance to Bliss. *Held*, in an action by Williams, that the time must be reckoned from the time of the first determination of the directors not to pay, and that the payment to Bliss did not revive the claim, nor take it out of the limitations; and that the cause of action was not capable of being revived by an acknowledgement or new promise. *Williams v. Vermont Mut. Fire Ins. Co.* 20 Vt. 222. 1848.

§ 4. Where the policy limited the time for bringing an action after the loss, the mere fact that at various times there were negotiations between the parties, with a view of referring to arbitrators the matter in dispute between them, and without any express agreement to suspend legal remedies, to await the issue of these negotiations,

does not, in the absence of fraud upon the part of the company, defeat the clause of limitation. *Gooden v. Amoskeag Fire Ins. Co.* 20 N. H. 73. 1849.

§ 5. Where policy provided that suit must be brought within a certain time after a loss had occurred; *Held*, that such condition was invalid and not binding on the assured. *Eagle Ins. Co. v. Lafayette Ins. Co.* 9 Ind. 443. 1857. *French v. Lafayette Ins. Co.* 5 McLean, C. U. S. 461. 1853.

§ 6. Where policy stipulated that suit for any loss should be brought within twelve months next after such loss or damage had occurred, and assured did bring suit within the twelve months, but was nonsuited, and did not commence a second suit until after the twelve months had expired; *Held*, that he was barred by the clause of limitation of time for commencing suit, and could not recover. *Wilson v. Aetna Ins. Co. of N. Y.* 27 Vt. 99. 1854.

§ 7. Where insurers, by holding out to assured hopes of an amicable adjustment, have themselves caused the delay, they cannot take advantage of a stipulation in the policy, that suit shall be brought within twelve months next after a loss and damage, or claim shall be barred. *Grant v. Lexington Ins. Co.* 5 Ind. 23. 1854.

§ 8. One of the conditions of a policy of insurance was that no action should be brought under it against the company, unless within twelve months after the right accrued. The plaintiff alleged a waiver of this condition; and relied upon an alleged conversation between his agent and the president of the company. *Held*, that the condition could not be so waived, and that such evidence was properly rejected. And where the secretary of the company wrote to the agent of assured saying, "I am desired by the president and board of directors to acquaint you,

that the party having failed in substantiating any claim for loss by accident or misfortune, as required by the conditions of the policy, the board is not disposed to admit the same;" *Held*, that such letter contained no evidence of a waiver of this condition. *Lampkin v. Western Assurance Co.* 13 Upper Canada, Q. B. 237. 1855.

§ 9. A provision of the act of incorporation requiring action to be brought within a specified time after directors shall ascertain and determine the amount of loss, applies where directors wholly reject the claim; and failure to bring suit within the time mentioned is a bar to any action afterwards. *Dutton v. Vermont Mut. Fire Ins. Co.* 17 Vt. 369. 1845. *Portage County Mut. Ins. Co. v. West*, 6 Ohio St. 599. 1856.

§ 10. By the term of the plaintiff's policy, they were insured "subject to the provisions and conditions of the charter and by-laws" of the insurance company. One of the conditions required suit for any loss claimed, to be brought within a specified time, and in a particular county. *Held*, that that part of the by-laws requiring the action to be brought in a particular county was invalid, but the part referring to the time within which such suit must be brought, was valid. *Held* further, that the whole by-law was not void because one part of it was invalid, as the valid part could be separated from the invalid, and carried into effect. *Amesbury v. Bowditch Mut. Fire Ins. Co.* 6 Gray, Mass. 596. 1856.

§ 11. The by-laws of a mutual insurance company provided that, upon the happening of a loss, directors would proceed to ascertain the liability of the company, and if the assured did not acquiesce in the determination of the directors, he should within a certain time bring an action at law "for the loss claimed." *Held*, that the clause, by its terms, was confined to the "loss claimed," leaving the assured's remedy to recover the amount "determined" by the directors, subject to no limitation other than that

fixed by law ; and that in a suit for the "loss claimed," assured might amend and take judgment for the amount ascertained and determined by the directors. *Amesbury v. Bowditch Mut. Fire Ins. Co.* 6 Gray, Mass. 595. 1856.

§ 12. Conditions of policy provided, 1st, that suit should be brought within six months from date of loss ; 2d, that the company should have ninety days after proofs were filed, to pay in. Proofs were filed in nine days after loss, to which company excepted eighty-five days afterwards, and, upon correction, insisted on ninety days more, and then stood suit and plead the six months' limitation. *Held*, that the limitation was waived. *Ames v. N. Y. Union Ins. Co.* 14 N. Y. 254. 1856.

§ 13. Plaintiffs insured a steamer for £1,500, and re-insured with defendants for £500, under a policy which provided that no suit should be maintained thereon unless commenced "within the term of twelve months next after any loss or damage shall occur." The steamer was injured in November, 1854, and the plaintiffs having paid the amount claimed on the 9th of August, 1855, brought this action on the 8th of August, 1856, to recover from the defendants their proportion ; *Held*, too late, for that the "loss or damage" referred to in defendant's policy, was the injury to the vessel, not the payment by the plaintiffs. *Provincial Ins. Co. v. Ætna Ins. Co.* 16 Upper Canada, Q. B. 135. 1858.

§ 14. Where policy stipulated that no suit in law or chancery shall be sustainable unless commenced within a certain time specified next after the happening of such loss or damage ; *Held*, that such condition was valid and binding on assured. *Fullam v. New York Union Ins. Co.* 7 Gray, Mass. 61. 1856. *Brown v. Roger Williams Ins. Co.* 5 R. I. 394. 1858. *Brown v. Hartford Fire Ins. Co.* 5 R. I. 394. 1858. *Brown v. Savannah Mut. Ins. Co.* 24 Georgia, 97. 1858. *North Western Ins. Co. v. Phoenix Oil & Candle Factory*, 31 Penn. St. 448. 1858.

§ 15. Where policy provided "that no suit or action at law or in equity shall be maintained against the company, upon or by virtue of this policy, unless the same shall be brought within six months from the time of the loss or damage by fire; and after the expiration of six months from such fire, such lapse of time shall be conclusive evidence against the validity of any claim under this policy;" *Held*, that the stipulation was binding, and proof of the waiver of it must be positive.

An attachment execution, served on the insurance company before the expiration of the six months, by creditors of assured, will not excuse the failure to sue. It does not follow that the failure to sue will bar the recovery under the attachment execution. *Schroeder v. Keystone Ins. Co.* 2 Philadelphia, Pa. 286. 1858.

§ 16. A twelve months' statute of limitation, although assented to by the parties, operates as a forfeiture. It is, therefore, to be construed strictly. Slight evidence of waiver, as in other cases of forfeiture, will be sufficient to defeat its application. "A positive act of the company, intended to induce postponements," is not necessary. The court, especially to aid a forfeiture, and a very harsh one, too, will not scrutinize very closely the verdict of a jury on such a point; nor, the rulings of the judge at the trial, unless very clearly erroneous. *Ripley v. Aetna Ins. Co.* 29 Barb. N. Y. 552. 1859.

§ 17. Declaration on a policy of insurance alleged to have been sealed and executed by defendants. Plea, that the policy was subject to a condition that no action should be brought on it except within six months from the loss, and that the plaintiff did not sue within that time. Replication, on equitable grounds, that when the loss occurred the defendants had not yet issued a policy to the plaintiffs, although he had previously effected the insurance with them; that although requested they refused to

execute the policy until after the commencement of this action; and that in consequence of such delay he was prevented from suing within six months, as he otherwise would have done. *Held*, that the replication was bad, as a departure from the declaration, and as showing, in effect, that the plaintiff was proceeding upon an equitable cause of action.

The defendants also rejoined, upon equitable grounds, that long before the expiration of six months from the fire, the policy was executed and ready for delivery to the plaintiff, of which he had notice, and defendants never refused to execute it, nor withheld the same from the plaintiff. *Held*, good. *Hickey v. Anchor Assurance Co.* 18 Upper Canada, Q. B. 433. 1859.

§ 18. Policy provided "that no suit or action should be maintained in any court of law or chancery for any loss or damage under this policy, unless such suit or action shall be commenced within two years next after such loss or damage shall occur and become due." Another clause provided that "payment of losses should be made in ninety days after proofs had been received at the office of the company." A third clause required assured, in case of loss, to give notice forthwith, and "as soon after as possible" deliver in a particular account of such loss and damage, &c. Fire occurred on the 21st January, 1858, and proofs were furnished on the 25th of same month. Subsequently, on the 1st March, plaintiff, finding that, in consequence of a non-settlement of accounts with the party against whom he held the claim insured, he had not correctly stated the amount of his interest, made further proof and sent to the company. *Held*, 1st, that the clause limiting the time for bringing action, was binding and valid; 2d, that the terms "as soon as possible," meant with all reasonable diligence under the circumstances of the case, and that it was for the jury to determine whether such diligence had been used, and whether the proofs had been completed fully on the 25th January

or not until the subsequent proof of March 1st; and whichever period was settled upon by them, they must then allow a reasonable time for such proofs to reach the office, and ninety days after that time for the commencement of the two years in which the suit was to be brought. *Longhurst v. Conway Fire Ins. Co.* U. S. D. Ct. Northern Division, Iowa, October Term. 1861.

§ 19. A condition of policy, requiring suit for any loss or damage under the policy to be brought within a stipulated time, is a valid condition, but under the code prior to the Revised Code of 1860, of Iowa, must be taken advantage of by plea and not by demurrer. *Carter v. Humboldt Fire Ins. Co.* Supreme Court of Iowa, June Term. 1861.

§ 20. The insurance was on a mechanic's lien interest, and the policy contained a condition requiring suit to be brought within twelve months after the loss. Immediately after the fire an action was brought to establish the mechanic's lien, proofs of loss were furnished, and an action was brought on the policy, but the latter was not commenced till more than twelve months after the loss. *Held*, that in ordinary cases, such a condition, limiting the time within which suit might be brought, would be valid and binding; but that in regard to policies of insurance, as well as all other contracts, the whole contract and all its parts are to be construed together; and that, as it appeared in this case that the policy required proof of the value of the interest insured to be made before payment of the loss could be demanded, and as the best and indeed the only evidence of the value of a mechanic's lien is the judgment of the court establishing it, and as the suit to establish the lien appeared to have been prosecuted with diligence, this condition was inoperative. *Stout v. City Fire Ins. Co. of New Haven*, Supreme Court of Iowa, June Term. 1861.

§ 21. The condition of policy requiring suit for any

loss or damage, under the policy, to be brought within a stipulated time, held valid and reasonable; though there might be a waiver of such condition by the conduct of the company. *Peoria Marine & Fire Ins. Co. v. Whitehill*, 25 Ill. 466. 1861.

§ 22. Where a period of limitation is stipulated for in a policy of insurance, it is binding upon the parties; and the provisions and qualifications of the general statute of limitations of the State have no application. The court have no right to import into the contract of the parties qualifying terms which they have not seen fit to adopt. *Brown v. Roger Williams Ins. Co.* 7 R. I. 301. 1862.

§ 23. A condition in a policy that no recovery shall be had, unless suit is brought within a certain time, is valid. *Patrick v. Farmers' Ins. Co.* 43 N. H. 621. 1862.

§ 24. Where an action at law was brought on a policy within the period of limitation fixed by such policy, which it was found could not be sustained by reason of a mistake in the form of the policy, and a bill in equity was brought while that suit was pending, and after the period of limitation had expired, for the correction of the policy and for an injunction against the defense set up in the action at law; *Held*, that the suit in equity was not barred by the expiration of the time limited. *Woodbury Savings Bank v. Charter Oak Ins. Co.* 31 Conn. 518. 1863.

§ 25. A condition in a policy that no suit shall be brought in case of loss unless within six months after the loss, is valid and binding on the insured. *Woodbury Savings Bank v. Charter Oak Ins. Co.* 31 Conn. 518. 1863.

§ 26. Conditions in a policy of insurance, that no suit shall be sustainable thereon unless commenced within six

months after a loss occurs, and also that the payment of losses shall be made in sixty days from the date of the adjustment of preliminary proofs of loss by the parties, must be so construed as not to conflict unnecessarily with each other. And where the parties, in good faith, and without any objection that unnecessary time is taken for the purpose, are occupied so long in adjusting proofs that sixty days from the date of adjustment does not expire within the six months, the policy does not become forfeited merely because the suit is not brought within six months and before the loss is payable. An action brought promptly upon the expiration of sixty days from the adjustment of loss, will not be barred, though more than six months have elapsed since the loss. *Mayor &c. of New York v. Hamilton Fire Ins. Co.* 16 Bosw. N. Y. 537. 1863.

§ 27. Where the insurer on being applied to for the payment of a loss under a policy containing a condition limiting the time within which suit might be brought, declined paying it, on the ground that actions had been commenced against him by other parties which were still pending, and declared he would do nothing in reference to such loss while those suits were pending. *Held*, that this did not amount to a waiver of such condition, nor was the insurer thereby estopped from insisting on such condition as a defence. *Ripley v. Ætna Ins. Co.* 30 N. Y. 136. 1864.

§ 28. A condition limiting the period to six months after the happening of a loss, within which suit may be brought upon the policy, is valid; and will bar an action not commenced within that time. *Roach v. New York & Erie Ins. Co.* 30 N. Y. 546. 1864.

§ 29. Likewise a stipulation that an action shall be commenced within one year. *Ripley v. Ætna Ins. Co.* 30 N. Y. 136. 1864.

§ 30. A condition in a policy limiting the time within which a suit may be brought for the recovery of any claim upon it, to one year from the happening of a loss, is valid and binding. *Ripley v. Ætna Ins. Co.* 30 N. Y. 136. 1864.

§ 31. By one of the conditions attached to a fire policy, it was provided that no suit should be brought upon it unless within twelve months next after the loss; and in case any suit should be commenced after the expiration of twelve months, the lapse of time should be deemed and taken as conclusive evidence against the validity of the claim; *Held*, that if such a condition was valid at all, it was valid as a contract only, and that the limitation fixed by it must, upon the principle governing contracts, be more flexible in its nature than one fixed by statute, and liable to be defeated or extended by any act of the insurer which prevents action being brought within the prescribed period. *Peoria Marine & Fire Ins. Co. v. Hall*, 12 Mich. 202. 1864.

§ 32. It is competent for the parties to a policy of insurance to provide therein that no action shall be maintained thereon for any loss after the lapse of a certain time after such loss; but such condition will not be enforced when so necessarily inconsistent with the nature of the interest insured as to render a recovery unattainable by the exercise of due diligence. *Longhurst v. Star Ins. Co.* 19 Iowa, 364. 1865.

See Assessments, § 5. By-Laws and Conditions, 10. Examination under Oath, 3. Notice of Loss, 26. Pleading and Practice, 35. Premium Notes in Advance, 11. Venue, 4, 8.

MORTGAGOR AND MORTGAGEE.

§ 1. The expenses of insurance are not, like taxes, a charge on the mortgaged premises, without a special stipulation to that effect; and cannot be added to the debt due in a bill of foreclosure. *Fame v. Winans*, 1 Hopkins Ch. N. Y. 283. 1824.

§ 2. A mortgagee in possession, for breach of condition, cannot insure the premises, and charge the premiums as a debt against the property, in absence of any agreement to that effect. *Sanders v. Winship*, 5 Pick. Mass. 260. 1827.

§ 3. If mortgagor requests the mortgagee to insure the premises, and the latter does effect insurance thereon, and pay the premiums for such insurance, the mortgagor must repay such premiums, in addition to the original debt. *Mix v. Hotchkiss*, 14 Conn. 32. 1840.

§ 4. Policy was assigned to a mortgagee, and by mortgagee to a third party, in both cases as collateral security; *Held*, that all premiums collected on the policy by mortgagee must be returned to the mortgagor, upon payment of the mortgage by the latter. *Felton v. Brooks*, 4 Cush. Mass. 203. 1849.

§ 5. In the absence of any agreement with the mortgagor, the mortgagee cannot add to the mortgage debt and charge upon the property, premiums paid by him for insurance. *Dobson v. Laud*, 8 Hare (Eng. Ch.) 216. 1850.

§ 6. Mortgage contained covenants of mortgagor to insure the premises in names of mortgagor and mortgagees, not adding their heirs, executors, &c. The mortgagees entered into possession after the mortgagor's death.

Those entitled to equity of redemption not having kept up insurance, the mortgagees took insurance on their own names. *Held*, that they were entitled to add the premiums to their mortgage debt. *Dobson v. Laud*, 4 De Gex & Smale, 575. 1851.

§ 7. Where the mortgagee insured the mortgaged property and charged the premiums to the mortgagor by virtue of a contract that mortgagor should keep the property insured; *Held*, that the premiums thus paid by the mortgagee should be added to the original debt, on a bill in equity to redeem, although mortgagee had effected the insurance in his "own name," "for whom it may concern," and had it made "payable to himself in case of loss." *Fowler v. Palmer*, 5 Gray, Mass. 549. 1856.

See Alienation, § 35, 45. Assignment, 41. Concealment, 17. Damages, 7, 20. Damages beyond Actual Loss, 4, 5, 6. Encumbrance, 2, 25. Evidence, 67. Insurable Interest, 26. Interest in Policy, 9, 12, 13, 16, 23, 25, 38, 39. Other Insurance, 5, 33, 54, 104. Subrogation, 7, 12. Who May Sue, 7.

MUTUAL COMPANIES AND MEMBERS OF.

§ 1. Plaintiff loaned \$6,000 to the Croton Insurance Company, receiving from the president, as collateral security, a number of premium notes. At maturity of the loan, June 24, 1846, the company's note was renewed for \$5,500, and as a condition of the renewal, an arrangement was made by the president with the plaintiff, that the latter should be furnished with additional security, in accordance with which arrangement the note in suit was transferred to the plaintiff on the 16th day of July, 1846. The company became insolvent on the 14th day of May, 1846, and the fact was known to the plaintiff before July. *Held*, that the Revised Statutes in New York, making invalid any assignment of a moneyed corporation which gave a

preference to particular creditors, was applicable to mutual insurance companies, and that the transfer of the note in suit, was therefore invalid, unless in some way it be excepted from the force of the statute; that the general understanding with the president, not carried into effect, before the actual insolvency of the company, could not overrule the statute; nor could the arrangement with the receiver, whereby the receiver relinquished all claim to the note, such arrangement taking place subsequent to the commencement of this suit, enable the plaintiff to maintain the action. *Furniss v. Sherwood*, 3 Sandf. N. Y. 521. 1850.

§ 2. A mutual insurance company in New York, whose charter is the same as that of the Jefferson County Mutual Insurance Company, may make in New York valid contracts of insurance on "personal property," wherever such personal property may be owned or situated. *Western v. Genesee Mut. Ins. Co.* 2 Kern. N. Y. 258. 1855.

§ 3. Under charter of a mutual insurance company, similar to that of the Jefferson County Mutual Insurance Company of New York; *Held*, that membership did not cease with the destruction of the property insured, but continued for the whole term for which their policies were issued. *Bangs v. Scidmore*, 24 Barb. N. Y. 29. 1857.

§ 4. A mutual insurance company, organized under the general act of 1849, in New York, is not authorized to do business on the mutual and stock plans, combined, receiving of some, premium notes, and of others, cash in lieu of such premium notes. *Hart v. Achilles*, 28 Barb. N. Y. 576. 1858.

§ 5. There is a wide distinction between the liabilities of those who give notes to form the capital stock of a mutual insurance company, and of those who give notes for premiums after the stock is made up and the company

brought into existence. While the former class are liable on their notes, irrespective of losses, the latter are liable only for the *pro rata* share of such losses, in common with all other available premium notes held by the company. *Dana v. Munro*, 38 Barb. N. Y. 528. 1860.

§ 6. Notwithstanding a clause in the charter of a mutual insurance company, declaring that all persons who shall insure with the company, and their heirs, &c., "so long as they shall be insured in said company, shall be and continue members thereof and no longer," persons insured are still members of the company, and liable to contribute for the losses sustained, although they may have done some act which by the terms of the policy works a forfeiture. *Hyatt v. Wait*, 37 Barb. N. Y. 29. 1862.

§ 7. The surrender of a policy in a mutual company by the insured, and its cancellation by the insurance company, dissolves the relation of the insured as a member thereof, and the company has no further claims upon him, except for unpaid assessments previously made. *Campbell v. Adams*, 38 Barb. N. Y. 132. 1862.

§ 8. Where A. has duly become a member of a mutual fire insurance company, and subsequently the company pass a by-law which is in conflict with their charter, this by-law cannot, unless assented to by A., change and impair his rights under his previous contract. *Great Falls Mut. Fire Ins. Co. v. Harvey*, 45 N. H. 292. 1864.

§ 9. A mutual fire insurance company organized under the laws of Indiana, has power to provide in its articles of association or by its by-laws, that, upon a failure after notice to pay an assessment upon a premium note, the entire note shall become due and collectable. *German Mut. Fire Ins. Co. v. Franck*, 22 Ind. 364. 1864.

§ 10. A by-law of an insurance company, which pro-

vides that a special meeting shall be called by the president, or in his absence by the secretary, on application made to them in writing by ten members, does not preclude the directors from calling special meetings without such application. *Citizens' Mut. Fire Ins. Co. v. Sortwell*, 8 Allen, Mass. 217. 1864.

§ 11. A mutual insurance company in Massachusetts may resume business, after passing a vote to take no more risks. *Traders' Mut. Fire Ins. Co. v. Stone*, 9 Allen, Mass. 483. 1864.

§ 12. An action to compel a mutual insurance company to readjust its dividends, and to correct an error it has committed in issuing certificates of earnings, may be brought by a portion of the stockholders on their own behalf and on behalf of other stockholders who are interested with them in the same questions, and who may elect to come in and contribute to the expenses of the suit, and be bound by the judgment. *Luling v. Atlantic Mut. Ins. Co.* 45 Barb. N. Y. 510. 1865.

§ 13. Where, by an act of the legislature of Massachusetts, three independent mutual insurance companies were incorporated in one under a new name, with a provision that the act "shall not affect the legal rights of any person," nor take effect until it shall be accepted by the members of said corporations respectively, at meetings called for that purpose; *Held*, that a member of one of the old corporations not expressly assenting to such act was not, by the mere force thereof, constituted a member of the new organization. Such person must seek any remedies to which he may be entitled on a policy, against the original corporation of which he was a member. *Gardner v. Hamilton Mut. Ins. Co.* 33 N. Y. 421. 1865.

§ 14. A member of a mutual insurance company who has contracted with it as a valid corporation, is not in a position to object to the regularity of the incorporation or

formation of the company. *Sands v. Hill*, 42 Barb. N. Y. 651. 1865.

§ 15. A provision in the charter of a mutual insurance company that said company "may receive notes for premiums in advance, from persons to receive its policies, and may negotiate the same for the purpose of paying claims or otherwise, in the course of business," authorizes such company to transfer its notes thus received as collateral security for the payment of its debts. *Brookman v. Metcalf*, 32 N. Y. 591. 1865.

§ 16. Where a policy issued by a mutual insurance company referred to the articles of incorporation and by-laws which were attached thereto, and an assured became a member of the company; *Held*, that the assured was charged with knowledge of the provisions of the charter and by-laws. *Simeral v. Dubuque Mut. Fire Ins. Co.* 18 Iowa, 319. 1865.

§ 17. The members of a mutual insurance company are charged with knowledge of the rules and laws of the corporation. *Coles v. Iowa State Mut. Ins. Co.* 18 Iowa, 426. 1865.

§ 18. It is competent for the board of directors of a mutual insurance company, acting under provisions of the articles of incorporation and by-laws, authorizing them, when the payment of an assessment became delinquent, to recover the whole amount of the premium notes, and "at their option annul the policy of insurance," to pass a resolution declaring what holders of policies were delinquent on a certain assessment, and that those who should remain delinquent beyond a date mentioned, should be excluded and debarred, and lose all benefits of his insurance for and during the term of such default and non-payment, and still hold them liable for the payment of all subsequent assessments which should be made upon their several policies during the continuance of the same. *Coles v. Iowa State Mut. Ins. Co.* 18 Iowa, 425. 1865.

§ 19. A person insured in a mutual insurance company is a member of it, and is bound to become informed of its rules and regulations. *Mitchell v. Lycoming Mut. Ins. Co.* 51 Penn. St. 402. 1865.

§ 20. The fact that a company is a mutual company will not render an assured so far a member as to be bound by the acts of an agent of the company pending his application for insurance. *Columbia Ins. Co. v. Cooper*, 50 Penn. St. 331. 1865.

§ 21. A negotiable promissory note payable absolutely upon its face, and given to a mutual insurance company, may be negotiated by such company in the usual and ordinary course of business. *Farmers' Bank v. Maxwell*, 32 N. Y. 579. 1865.

§ 22. Under the statute of Massachusetts, the statement of the condition of a mutual insurance company at the time of laying an assessment may be recorded in the same book in which the annual statements of the company are recorded; and if signed by several of the directors, and it does not appear that any others voted for it, the presumption is that all who voted for it signed it. *Citizens' Mut. Fire Ins. Co. v. Sortwell*, 10 Allen, Mass. 110. 1865.

§ 23. The liabilities of the members of a mutual insurance society depend usually on the rules of the society and not on the policy; consequently where in a policy the premium and rate per cent. were left blank, and the words "twenty pounds per cent." were written in in a separate line; *Held*, that such words did not limit the amount for which each member was liable to 20 per cent. on the sum he had insured. *Gray v. Gibson*, Law Rep. 2 C. P. 120. 1866.

See Agent, § 50. Assessments, 8, 17, 42, 48, 51, 52, 55, 57, 68. Foreign Insurance Companies, 9, 14. Illegality of Contract, 7, 8. Parol Contract, 5. Payment of Premium, 11, 13. Premium Notes, 34, 35, 36, 46. Return Premium, 2. Successive Losses, 2.

NEGLIGENCE.

§ 1. A loss by fire, occasioned by the mere fault and negligence of the assured, or his servants, or agents, and without fraud or design, is a loss within the policy. *Columbian Ins. Co. v. Lawrence*, 10 Pet. U. S. 507. 1836.

§ 2. Assured may be guilty of such gross misconduct, not amounting to a fraudulent intent to burn the building, as to deprive him of his right to recover on the policy. *Chandler v. Worcester Mut. Fire Ins. Co.* 3 Cush. Mass. 328. 1849.

§ 3. Negligence of the insured's servants or agents does not, in the absence of fraud, prevent recovery on the policy. *Williams v. New England Mut. Fire Ins. Co.* 31 Maine, 219. 1850. *St. Johns v. American Ins. Co.* 1 Duer, N. Y. 371. 1852. *Hynds v. Schenectady County Mut. Ins. Co.* 16 Barb. N. Y. 119. 1852. *Gates v. Madison County Mut. Ins. Co.* 1 Selden, N. Y. 469. 1861. *Catlin v. Springfield Ins. Co.* 1 Sumner, C. C. U. S. 434. 1833. *Matthews v. Howard Ins. Co.* 13 Barb. N. Y. 234. 1852.

§ 4. Carelessness or negligence, as such, cannot be held to be a defense to an action on a policy of insurance. In the absence of fraud, it is the proximate cause of the loss that is to be considered. If, however, the acts done or neglected to be done are of a character which tend to show design or fraud, they would be admissible. *Huckins v. People's Mut. Ins. Co.* 11 Fost. N. H. 238. 1855.

§ 5. The failure of insured to repair a defect in the property, arising after the contract was made, unless he be guilty of gross neglect, does not work a forfeiture of the assured's right to recover on the policy. *Whitehurst v. Fayetteville Mut. Ins. Co.* 6 Jones Law, N. C. 352. 1859.

§ 6. Where a steamboat was insured, among other risks, against fire, and afterwards was put upon floating dock for repairs, and while on the dock was burned, through carelessness and negligence of the workmen having the boat in charge, the insurers were held liable. *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713. 1844.

§ 7. In an action on a policy of insurance against fire, evidence is inadmissible to prove that the loss occurred through negligence of an agent of the assured. The evidence is irrelevant. *Henderson v. Western Marine & Fire Ins. Co.* 10 Rob. La. 164. 1845.

§ 8. Mere negligence on the part of a person insured, although the direct cause of a loss by fire, is not a defence to an action upon a policy against fire, if he acted in good faith, and his negligence did not amount to recklessness and wilful misconduct. *Johnson v. Berkshire Mut. Fire Ins. Co.* 4 Allen, Mass. 388. 1862.

§ 9. The usual clause in a policy that upon the happening of a fire the insured shall use all reasonable means for "the protection" of the property, does not require them to use means to restore it to its condition before the fire, but only to take the necessary steps to prevent its final destruction or further deterioration, and to put it in a condition to be examined. Thus, where a large part of the goods insured were shirts, bosoms, and collars, most of which were injured only by water or by handling; *Held*, that the insured were not bound to have them relaundried. *Hoffman v. Aetna Fire Ins. Co.* 1 Robert. N. Y. 501. 1863. S. C. 19 Abb. Pr. 325. Affirmed 32 N. Y. 405.

§ 10. Where a risk has not been increased within the conditions of a policy, it is not a defence to an action upon it, that the plaintiff might have been more careful in the management of a business which he was permitted, by the terms of the policy, to carry on. *Brown v. Kings County Fire Ins. Co.* 31 How. N. Y. 508. 1865.

See Risk, § 32.

NEW TRIAL.

§ 1. Where verdict had been rendered against an insurance company, the court refused to grant a rule *nisi* for a new trial on the ground that, subsequently to a verdict for the plaintiff, the grand jury had found a bill against him and others for a conspiracy to defraud the insurance company in this very matter. But, upon affidavits disclosing the conspiracy itself, and showing that the defendant did not attain a knowledge of it till after the trial, so that the plaintiff's case was in effect a surprise on them, the court granted a rule *nisi* for a new trial on payment of costs. *Thurtell v. Beaumont*, 1 Bing. 339. (E. C. L. 538.) 1823.

§ 2. The court will not grant a new trial, after two concurring verdicts, in a case where there were many witnesses, and a great deal of testimony on both sides upon a mere question of fact (supposing there was no misdirection), although the verdict was against the weight of evidence. *Fowler v. Aetna Fire Ins. Co.* 7 Wend. N. Y. 270. 1831.

§ 3. In case of fraud, where new discovered evidence is cumulative upon the fraud, but of new facts, a new trial will be granted. *Harris v. Protection Ins. Co. Wright, Ohio*, 548. 1834.

§ 4. Where the preliminary proofs are loose and indefinite, interest ought not to be allowed, but if interest has been allowed, the verdict will not for that cause be set aside, but the plaintiff will be allowed to remit interest and let the verdict stand. *McLaughlin v. Washington County Mut. Ins. Co.* 23 Wend. N. Y. 525. 1840.

§ 5. If at time of making application for an in-

surance, anything was said or done to raise a doubt as to the authority of the agent to make such insurance, it will be too late to raise the question on a bill of exceptions for a new trial. *Lightbody v. North American Ins. Co.* 23 Wend. N. Y. 18. 1840.

§ 6. If in an action on a policy of insurance, the plaintiff procure a material witness to be hired to keep out of the way, so that he could not be summoned by the defendants, the verdict will be set aside. *Crafts v. Union Mut. Fire Ins. Co.* 36 N. H. 44. 1858.

§ 7. Though a waiver must be intentional and clearly proven, the sufficiency of the evidence relating thereto is for the jury, whose error in judgment thereon can be corrected only by motion for new trial. *Lycoming County Mut. Ins. Co. v. Schollenberger*, 44 Penn. St. 259. 1863.

See Concealment, § 2, 17. Contribution, 4. Increase of Risk, 15. Parol Evidence, 25. Questions for Court and Jury, 1.

NOTICE OF LOSS.

§ 1. Where "notice of loss" was given to the company by the assignee of the policy, which had been assigned with consent of the insurer; *Held*, that it was a compliance with the condition, "That all persons insured by the company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the agent." *Cornell v. Le Roy*, 9 Wend. N. Y. 163. 1832.

§ 2. Where it appeared in evidence that the president and one of the directors of the company went to the place where the fire was, for the purpose of examining into the matter; *Held*, that the assured might well be excused from giving any further notice to the company, as

he could not make it more certain. If the knowledge be fully communicated, courts are not very particular as to the form in which it is done. *Roumage v. Mechanics' Fire Ins. Co.* 1 Green, N. J. 110. 1832.

§ 3. The declaration of assured, in an action on a policy of insurance, alleged that the buildings insured had been consumed on the 23d of February, 1837, and that he gave notice thereof to the defendants on the 2d of April ensuing. *Held*, that this was no compliance with the condition of the policy, requiring notice of a loss to be given "forthwith;" that "forthwith" meant immediately, without delay, directly; and that a notice given thirty-eight days after the fire, was neither a literal nor a substantial compliance with the condition. *Inman v. Western Fire Ins. Co.* 12 Wend. N. Y. 452. 1834.

§ 4. Policy provided "that persons sustaining loss or damage by fire, shall forthwith give notice thereof in writing to the company," &c.; *Held*, that a neglect to give notice of a loss, until more than four months afterwards, was fatal to the claim. *McEvers v. Lawrence*, 1 Hoff. Ch. N. Y. 171. 1839.

§ 5. The condition, requiring "notice of loss forthwith," is to be construed as meaning with due diligence and without unnecessary delay, and whether such due diligence has been used is a question to be determined by the jury. *Edwards v. Baltimore Ins. Co.* 3 Gill, Md. 176. 1845.

§ 6. Where "notice of loss" is required, and, upon demand for payment on policy, the underwriters reply that the proof is unsatisfactory, there has been a material concealment, and all rights are forfeited under a certain article of the policy, and add that they reserve all objections to a recovery in any form, and without intending to waive any of their rights under the policy; this answer cannot be construed as a waiver of the objection that no-

tice of loss was not given forthwith. *Edward v. Baltimore Ins. Co.* 3 Gill, Md. 176. 1845.

§ 7. Where policy requires notice forthwith in case of loss, it is only necessary that the notice should be given with due diligence under all the circumstances of the case. The receiving a notice, and failing to make objection to its being in time, is no waiver of the delay. *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278. 1848.

§ 8. Where policy required "notice of loss in writing within thirty days after the fire," and such notice was given within that time, but was accompanied by a request from assured to the underwriters, to take part in measures instituted for detecting the cause of the fire; *Held*, that the addition of such request did not invalidate the notice. *Rix v. Mutual Ins. Co.* 20 N. H. 198. 1849.

§ 9. Where notice was merely of a loss, and defective in other particulars, and the president of the company, after visiting the ruins, made no objection to the notice, nor called for any further particulars, but refused to pay the loss altogether; *Held*, that the company had thereby waived any further or different notice. *Clark v. New England Mut. Ins. Co.* 6 Cush. Mass. 342. 1850.

§ 10. The policy required "notice of loss forthwith." Two or three days after the fire, assured went to the agent's office and told him the property was burnt, whereupon the agent went to the ruins and examined the premises. Twenty days after the fire a written notice was given to the agent, who told the assured "that the press of business was so great, that his matter could not be attended to just then." Subsequently a travelling agent of the company investigated the matter, examined books and papers of assured, and refused to pay the claim. *Held*, that the notice was sufficient under the circumstances. *Philips v. Protection Ins. Co.* 14 Mo. 220. 1851.

§ 11. Where the act of incorporation and by-laws were not referred to in the policy or made a part thereof, and one of such by-laws required a "notice of loss forthwith;" *Held*, that the assured, under this policy, upon giving the company reasonable notice of a loss, was entitled to recover. *Kingsley v. New England Mut. Fire Ins. Co.* 8 Cush. Mass. 393. 1851.

§ 12. Where fire occurred on the 10th of August, and notice of the loss, dated on the 11th, was received by the secretary on the 15th of the same month by mail; *Held*, that this was a compliance with the condition of the policy requiring immediate notice of loss. *Held* further, that if, upon receipt of such notice, the secretary informed assured that prompt steps would be taken to adjust and examine the matter, and the company subsequently refused to pay the loss on other grounds, this was a waiver of the objection on the part of the company. *Schenck v. Mercer County Mut. Ins. Co.* 4 Zab. N. J. 447. 1854.

§ 13. Where assured, in their declaration, in an action on policy of insurance, alleged the giving of notice of loss, and the defendants did not deny it in their answer; *Held*, that they could not avail themselves of the objection that no notice was given, upon the trial. But that even if they could, the notice was sufficient, when given within eight days after the fire, and five days after the assured knew of the fire. *New York Central Ins. Co. v. National Protection Ins. Co.* 20 Barb. N. Y. 468. 1854.

§ 14. Policy required notice of loss and particulars thereof as soon after as possible. There were two separate policies issued to assured—one on a shop, and the other on goods contained in it. Both building and goods were destroyed. It appeared that the fire took place on the 13th of June, and the notices, both as to shop and goods, were given on the 13th of July. The defendants then entered into correspondence with the assured as to

furnishing better particulars, which were afterwards furnished; and they then refused to pay for the goods on account of some suspicious circumstances attending the fire, but they paid the amount insured on the house. *Held*, that under these circumstances the defendants were precluded from objecting to the sufficiency of the notices, or to the time at which they were given. *Lampkin v. Ontario Marine & Fire Ins. Co.* 12 Upper Canada, Q. B. 578. 1854.

§ 15. Where condition of policy requires notice of loss forthwith, it will be understood to require the use of due diligence, and that it shall be given within a reasonable time, under the circumstances. *Peoria Ins. Co. v. Lewis*, 18 Ill. 553. 1857.

§ 16. Where policy required "immediate notice of loss," and the notice was not given until eleven days after the fire, no sufficient excuse being shown for the delay; *Held*, that the notice was too late, and not a compliance with the provision. *Trask v. State Fire & Marine Ins. Co.* 29 Penn. St. 198. 1858.

§ 17. The facts that the secretary of the company received a "notice of loss" without objection as to delay in giving it, and gave instructions to the insured as to the form of his statement of loss, and that an agent of the company subsequently made examinations respecting the loss, is not a waiver of the requirement of due and timely notice. *Trask v. State Fire & Marine Ins. Co.* 29 Penn. St. 198. 1858.

§ 18. Under policy of insurance, "on stock of grain in mill," which provided for "notice of loss forthwith," to be sent to the secretary or other authorized officer of the company, the assured notified one of the directors the morning after the fire, who agreed to give notice to the company, ten miles distant, the day following, and though there was no evidence that such notice had in fact been

given, yet a few days afterwards the president of the company and another director came to the ruins, examined the circumstances attending the loss, and also the amount thereof, but said nothing about the want of notice. On the 25th of same month, or eleven days after the fire, the assured sent a formal notice of the loss to the company, with the particular statement under oath, as required by the condition.

Held, 1st, that proof of the "notice of the loss" was a condition precedent, and essential to the plaintiff's right to recover; 2d, that neglect to give such notice could not be compensated by a deduction from the claim of assured; 3d, that a director of the company was not an authorized officer, to whom such notice could be given; but 4th, that such notice might be waived by the insurers, and that the jury might find from the conduct of the parties whether there had or had not been such a waiver. *Inland Ins. & Deposit Co. v. Stauffer*, 33 Penn. St. 397. 1859.

§ 19. A requisition in a policy of insurance, that the assured shall forthwith give notice of a loss to the company, is not complied with, by giving notice at the expiration of twenty days, although the particular account of the articles lost and damaged accompany the notice. *Whitehurst v. North Carolina Mut. Ins. Co.* 7 Jones Law, N. C. 433. 1860.

§ 20. Where charter and by-laws of mutual insurance company require a notice of loss within thirty days after the loss or damage has occurred, if a notice of loss is given as required by the policy, and it is defective, the company should object to it in season to allow the assured to remedy the defect; otherwise they will be considered as waiving exceptions for that cause. *Bartlett v. Union Mut. Fire Ins. Co.* 46 Me. 500. 1859.

§ 21. Where the by-laws of an insurance company require the assured to give notice in writing of a loss, within sixty days, a letter written by an agent of the com-

pany, at the request of the assured, giving notice of the loss, and sent in due time, is a sufficient compliance with the requirement, although the fact of its having been written at the request of the insured, does not appear in the letter. *Stimpson v. Monmouth Mut. Fire Ins. Co.* 47 Me. 379. 1860.

§ 22. The requirements of a policy that the insured, in case of loss, should give to the secretary of the company, in writing, a particular account of the loss, are not waived by the president of the company examining the books of the insured to ascertain their loss, or by his giving the insured at their request a memorandum of what the statement should contain. *Lycoming County Ins. Co. v. Updegraff*, 40 Penn. St. 311. 1861.

§ 23. Where notice of a loss is required to be given to the secretary of the company by the assured, in writing, a written notice to the secretary from the local agent, upon information conveyed to him by the assured, is sufficient. *West Branch Ins. Co. v. Helfenstein*, 40 Penn. St. 289. 1861.

§ 24. A condition that notice of the loss be given to the company forthwith, requires from the assured due diligence under all the circumstances of the case; therefore notice of a loss at T., given verbally to the local agent at S., twelve miles distant, and by him communicated to the secretary at L., seventy miles distant, within five days after the fire, is a substantial compliance with the requirements of the policy, and is in time. *West Branch Ins. Co. v. Helfenstein*, 40 Penn. St. 289. 1861.

§ 25. If the condition of a policy requires notice of a loss to be given in writing to the secretary, or one of the directors, notice by parol to an agent will be of no effect. *Patrick v. Farmers' Ins. Co.* 43 N. H. 621. 1862.

§ 26. Where a policy of insurance provides that the

"loss or damage shall be paid within sixty days after due notice and proof thereof, in conformity to the conditions annexed to this policy," no action can be maintained thereon until the notice is given, and the required proof is furnished. *Davis v. Davis*, 49 Me. 282. 1862.

§ 27. A vote by the directors of an insurance company to indefinitely postpone the subject of a loss, will not be deemed a waiver of a condition of the policy, requiring notice of the loss to be given within thirty days. A defect in time of the notice stands on different ground from a defect in its matter; and the silence of the company as to such defect should not be deemed a waiver. *Patrick v. Farmers' Ins. Co.* 43 N. H. 621. 1862.

§ 28. A notice of loss will not be rendered ineffectual by an omission to mention that the debt of the assignee of the policy as mortgagee, was also secured on other property. *Barnes v. Union Mut. Fire Ins. Co.* 45 N. H. 21. 1863.

§ 29. It is an error to submit to the jury the question of notice to the defendant of other insurance, where the evidence shows that none was given to the company or its authorized agent, but only that the fact was ascertained by the agent of another insurance company while transacting business for his principal, and was not communicated to the defendant. *Lycoming Ins. Co. v. Mitchell*, 48 Penn. St. 368. 1864.

§ 30. Where a policy contains a condition that "all persons insured by the company shall deliver a particular account of loss or damage, signed by their own hands, containing," &c. &c., a notice by a third person for the insured, such person being interested in the policy, but not an agent of the insured, is not sufficient. *Ayres v. Hartford Fire Ins. Co.* 17 Iowa, 176. 1864.

§ 31. Where a condition of an insurance policy

requires that the assured shall give written notice of the loss to the secretary of the company within twenty days after it occurs, an oral notice to the local agent two days after the loss, and written notice to the secretary more than a month afterwards, is not a substantial compliance with the condition. *Cornell v. Milwaukee Mut. Fire Ins. Co.* 18 Wis. 387. 1864.

§ 32. Where a written notice of loss, given after the expiration of the time limited, states that the assured had given the company verbal notice within the time limited, through its agent (naming him), a neglect of the company to object at the time to this statement, is not a waiver of its right to object to the notice as insufficient on the trial. *Cornell v. Milwaukee Mut. Fire Ins. Co.* 18 Wis. 387. 1864.

§ 33. After an insufficient notice of loss was given, the secretary of the company wrote to the attorneys of the assured (who had requested a settlement), that the president of the company would be in their place on a specified day to arrange the matter; and afterwards wrote them that the matter was in the hands of the company's attorney, and when he returned to town the company could inform them what would be done. *Held*, that these statements did not constitute any waiver of the company's right to object to the notice as insufficient. *Cornell v. Milwaukee Mut. Fire Ins. Co.* 18 Wis. 387. 1864.

See Estoppel, § 6. Revival and Suspension of Policy, 6. Preliminary Proofs, 31. Questions for Court and Jury, 11, 13.

OTHER INSURANCE.

§ 1. Where one policy was on goods and the other on store and goods; *Held*, that the second policy protected the goods from the same peril, and was, therefore, a double insurance. *Harris v. Ohio Ins. Co.* 5 Ohio, 467. 1832.

§ 2. Where policy provided "that, if other insurance is effected on the same property, the assured would give notice and cause the same to be endorsed on the policy;" *Held*, that assured must prove that he gave such notice of subsequent policies, or he could not recover. *Harris v. Ohio Ins. Co. Wright*, Ohio, 544. 1834.

§ 3. Where policy prohibited any other insurance without notice and consent of the company, and provided that in case of other insurance with such consent, that the company should pay only that proportion of the loss which its policy bore to the whole amount insured; *Held*, that a policy taken out by the vendor of a dwelling-house, which assured had purchased and on which he obtained the policy in suit, was not other insurance within the meaning of the condition, and did not, therefore, avoid his policy, or compel him to receive but a proportional part of his loss from defendant company. That such clause referred only to insurances effected by himself or his assigns. *Ætna Ins. Co. of New York v. Tyler*, 12 Wend. N. Y. 507. 1834. Affirmed 16 Wend. N. Y. 385. 1836.

§ 4. Policy to warehouseman on goods, "his own, in trust, or on commission," with condition, that a failure to endorse on it an insurance on any of the goods in another company would avoid the policy. Some of the goods deposited, to wit, some wheat, were covered by a floating policy to the depositor, which was not endorsed on the

policy of the warehouseman, and which expired before the fire. *Held*, that the floating policy to the depositor was not within the condition; and that the warehouseman and depositor might jointly recover from the company the value of the wheat. *Donaldson v. Manchester Ins. Co.* 14 Cases in the Court of Sessions, 601. 1836.

§ 5. A policy is not avoided, under a condition requiring notice of subsequent insurance, because a second policy without notice had been taken in the name of a mortgagee of the first insured; for, if the second policy was effected by the mortgagee for his own exclusive benefit, it was not within the condition, and if it was taken for the benefit of mortgagor, and this should be deemed within the condition, then the second policy was itself void, under a condition in it requiring notice of the prior policy. *Jackson v. Massachusetts Mut. Fire Ins. Co.* 23 Pick. Mass. 418. 1839.

§ 6. Proof that assured informed insurer that there was a prior insurance at another office, but adding that it was on other property, does not show a compliance with the condition of the policy requiring "notice of other insurance," &c. *Stacey v. Franklin Ins. Co.* 2 Watts & Serg. Pa. 506. 1841.

§ 7. If a second policy contain a clause "that the policy shall be void if the assured has already made or shall make any other insurance on the same property, unless the same be allowed by the said company and specified in the policy, and then to pay ratably;" such clause does not affect the first policy, if the assured could not at any time recover on the second. *Stacey v. Franklin Ins. Co.* 2 Watts & Serg. Pa. 506. 1841.

§ 8. Insurance on goods in store is not additional insurance, under a policy insuring building and prohibiting any other insurance on property "connected with it." *Jones v. Maine Mut. Fire Ins. Co.* 18 Me. 155. 1841.

§ 9. The first insurance by a fire office was upon "merchandise generally, including liquors and groceries contained in store No. 37 South Wharves, for the use of whom it may concern, say merchandise without exception." A second policy was made in another office on coffee and other merchandise without exception, either on board the J. S. in this port, or in the brick store No. 37 South Wharves, in city of Philadelphia." A loss by fire happened on the goods in store, not brought in the J. S. or landed therefrom. *Held*, 1st, that facts and circumstances outside of the instrument were admissible to show the intention of the parties as to the second policy being a specific insurance on other goods not covered by the first; and, 2d, that as thus explained there was not necessarily a double insurance; but the first might be on goods generally, in the store, and the second on specific goods merely, brought in the J. S. or landed therefrom. *Stacey v. Franklin Fire Ins. Co.* 2 Watts & Serg. Pa. 506. 1841.

§ 10. A condition that "persons insuring property at this office must give notice of any other insurance, made on their behalf, on the same, and cause such other insurance to be endorsed on the policy; in which case each office shall be liable to the payment of a ratable proportion of any loss or damage which may be sustained, and, unless such notice is given, the insured will not be entitled to recover in case of loss," applies to subsequent, as well as prior insurance; and failure to have subsequent insurance endorsed will avoid the policy. *Harris v. Ohio Ins. Co.* 5 Ohio, 467. 1832.

§ 11. A condition that "persons insuring property at this office must give notice of any other insurance made in their behalf on the same, and cause such other insurance to be endorsed on the policy; in which case each office shall be liable to the payment of a ratable proportion of any loss or damage which may be sustained, and, unless such notice is given, the insured will not be entitled

to recover in case of loss;" applies to subsequent, as well as to prior, insurances. *Stacey v. Franklin Fire Ins. Co.* 2 Watts & Serg. Pa. 506. 1841.

§ 12. Part owner insured his two-fifths moiety in the Franklin Insurance Company. Afterwards the other part owner insured \$10,000 on same property, as "Trustee," for the benefit of the children, but not on behalf of first assured, as trustee had notice of first insurance. *Held*, that such second insurance did not avoid the first policy, as it was not an additional insurance within the meaning of the condition prohibiting it. *Franklin Ins. Co. v. Drake*, 2 B. Monroe, Ky. 47. 1841.

§ 13. A policy obtained by misrepresentation of cost and value of premises insured, is voidable, and not void; and a second underwriter, under condition in policy requiring notice of prior insurance, is entitled to notice of the same. And it is further argued by Judge Story, that stipulations as to prior and subsequent policies are designed to apply to all cases of policies then existing in point of fact, or whether they be void or voidable. *Carpenter v. Providence Washington Ins. Co.* 16 Pet. U. S. 495. 1842.

§ 14. A policy which has been assigned to a mortgagee as collateral security, is within the provision in a subsequent policy requiring notice of previous insurance. *Carpenter v. Providence Washington Ins. Co.* 16 Pet. U. S. 495. 1842.

§ 15. At law, whatever may be the rule in a case in equity, parol notice is not a compliance with the condition of the policy, requiring other insurance to be endorsed in writing on the policy. *Carpenter v. Providence Washington Ins. Co.* 16 Pet. U. S. 495. 1842.

§ 16. Assured applied to the agent of the defendant company for an insurance of two thousand dollars, stating

in reply to inquiry of the agent, that he had no other insurance on the property. In fact, he had already insured two thousand dollars in another company, and, with consent of that company, assigned the policy to a creditor from whom he had purchased the goods, and to whom he was yet indebted for the balance of the purchase money. The policy in suit provided, "that it should be void if prior insurance were not expressed in the policy." *Held*, that the policy, by its terms, was void, it having been obtained by fraud and misrepresentation. *Neve v. Columbia Ins. Co.* 2 McMullin, S. C. 220. 1842.

§ 17. Plaintiffs, who were grocers, had two policies of insurance on their stock in trade. Having subsequently purchased the stock of another grocer, which had been insured by the defendants, they removed their own stock to the establishment of their vendor, whose policy had been transferred to them with the consent of the defendants. Plaintiffs also obtained from their own insurers transfers of the policies on the stock in their former establishment to the same stock in the store to which they removed. The policies contained the usual clause requiring notice to insurers, and an endorsement on the policy of any other insurance elsewhere on the stock on pain of forfeiture. Plaintiffs omitted to notify defendants of the two insurances previously existing on their stock. The stock being injured by fire, in an action against defendants; *Held*, that by consenting to the transfer of the policy to the plaintiffs, defendants became the insurers of the stock in trade of the former in the store to which they removed, which stock consisted of the goods originally covered by their policy, and of plaintiffs' stock in their former store; that the latter were bound to give defendants notice of the two insurances previously existing on their stock, and that having failed to do so, they could not recover. *Walton v. Louisiana State Marine & Fire Ins. Co.* 2 Rob. La. 563. 1842.

§ 18. Policy stipulated "that notice of other insur-

ance must be given and endorsed on the policy, or otherwise acknowledged and approved in writing, or else the policy should be void." Assured effected a second insurance on the property, and notified the company by letter of the same. The secretary replied, "I have received your notice of additional insurance." *Held*, that this was an approval and acknowledgment in writing, within the meaning of the condition; and that after receipt of the notice, the policy continued in full force, until the company made their election to terminate the policy, and made known to the assured such determination. *Potter v. Ontario & Livingston Mut. Ins. Co.* 5 Hill, N. Y. 147. 1843.

§ 19. Where policy of insurance contained the usual stipulation in regard to forfeiture of policy, if prior or subsequent insurances existed, or were taken, without notice and consent, proof that another policy was obtained on the property, which was not notified to the insurer, will discharge the latter from all liability. *Battaile v. Merchants' Ins. Co. of N. O.* 3 Rob. La. 384. 1843.

§ 20. Where policy provided, that in case the assured had already made any other insurance on the same property, not notified to the corporation, the policy should be void; and the conditions annexed further provided, that all applications for insurance should be in writing, &c., but application made no inquiry as to other insurances, and at time of application the plaintiff verbally made known to the agent (who was only authorized to receive and forward applications, solicit insurances, and receive premium notes and cash percentage thereon) a prior insurance already existing, but agent failed to put it in the application, or otherwise notify the company of it; *Held*, 1st, that in the absence of any stipulation in the policy requiring notice of other insurance to be in writing, and no question in the application concerning it, parol notice was sufficient; 2d, that such notice to the agent, only authorized as above, and while actually engaged in preparing an application

for the policy in question, was within the scope of his authority, and binding on the company, though it never reached them. *McEwen v. Montgomery County Mut. Ins. Co.* 5 Hill, N. Y. 101. 1843.

§ 21. Where a policy of insurance provides that "in case of other insurance against loss by fire on the property hereby insured, not notified to this corporation, and mentioned in or endorsed on this instrument, or otherwise acknowledged by them in writing, this insurance shall be void;" and a third person, to whom the property insured had been transferred, and to whom the policy was assigned with the assent of the assurers, fails to notify the latter, at the time of the transfer, of another policy previously taken out by him on the same property, the insurers will be discharged. A declaration of the first insurance, made after the loss, in compliance with the stipulation that assured shall declare on oath whether any and what other insurance has been made on the same property, will be too late. *Levitt v. Western Marine & Fire Ins. Co.* 7 Rob. La. 351. 1844.

§ 22. A policy, covering a three story brick building called the Central Exchange, provided that "all policies which may issue from this company to cover property previously insured, shall be void, unless such previous insurance be expressed in the policy at the time it issues." On the margin of the policy, when issued, was written, "Five thousand dollars insured by the Worcester Mutual Insurance Company." It appeared that the insurance in the Worcester Mutual Company was in fact but \$4,700 on the building, and \$300 on a barn on the premises; and that the policy on the building included also a wooden end, which was not covered by the defendant's policy; *Held*, that a compliance with the above-mentioned by-law was a condition precedent to a recovery, in cases where it applied, but that in the present case, the notice expressed in the policy was a substantial compliance with the by-law, and a sufficient exposition of the fact of the former

insurance, although all the prior insurance was not upon the same building embraced in defendant's policy. *Liscom v. Boston Mut. Fire Ins. Co.* 9 Met. Mass. 205. 1845.

§ 23. Verbal notice of a prior insurance, given at the time of making application, to an agent authorized to make surveys and receive the cash percentage and the premium note, is sufficient, where the condition relating to prior insurance only requires "that notice thereof shall be given to the company." *Sexton v. Montgomery County Mut. Ins. Co.* 9 Barb. N. Y. 101. 1848.

§ 24. The charter, to which the policy was made subject, provided, that in case of other insurance on the same property, the policy should be void, "unless such double insurance subsist with the consent of the directors, signified by endorsement on the back of the policy, signed by the president and secretary." The plaintiff took a policy for five years, which was signed by the president and secretary, and which recited on its face that \$2,500 was insured "in a company in Concord." *Held*, that the requirements of the charter were substantially complied with. And further held, that the contract must be considered to be an insurance for five years, with a double insurance to the amount of \$2,500, to subsist during the whole term; and that, at the expiration of the Concord policy, plaintiff was at liberty to renew it, or to take a policy for the same amount in any other company, without giving any further notice to the company. *Baptist Society v. Hillsborough Mut. Fire Ins. Co.* 19 N. H. 580. 1849.

§ 25. Where, in obtaining a second policy, assured represented that the same property was already insured in another company for \$4,000, and it was so expressed in the policy, when in fact the prior policy did not cover all the property insured by defendants; *Held*, that the assured was estopped by his representation, and by the terms of the policy, to assert that the specific property

insured by the defendants was not insured to the amount and in the manner he had represented it to be, and as between these parties, the fact should be taken as it was represented. *McMahon v. Portsmouth Marine & Fire Ins. Co.* 2 Fost. N. H. 15. 1850.

§ 26. Where policy stipulated that if assured should effect a subsequent insurance on the property without notice and consent of the company, &c. the policy should be void; *Held*, that a second policy, taken out by the assured, which was void on account of misrepresentation, was not an insurance within the prohibition. *Clark v. New England Mut. Fire Ins. Co.* 6 Cush. Mass. 342. 1850.

§ 27. The mere fact that a prior policy is represented to a subsequent insurer to be on the same property, when in fact it does not embrace all the property covered by defendant's policy, or that the first policy is in specific amounts, whilst the second one is general, will not avoid a policy of insurance, because the insured is not bound to give any details unless inquired of, or required so to do by the by-laws. *McMahon v. Portsmouth Fire Ins. Co.* 2 Fost. N. H. 15. 1850.

§ 28. When by-law provides, that consent to additional insurance may be given by the president and secretary, and no other mode of giving such consent is provided for, it is an error to charge the jury that it may be given by a secretary or director. *Stark County Mut. Ins. Co. v. Hurd*, 19 Ohio, 149. 1850.

§ 29. The 18th section of the company's charter, declaring a double insurance on a house or building without consent of the company an avoidance of the policy, does not render a policy on merchandise void, although additional insurance had been taken without notice to, or consent of, the company, on said merchandise. *Illinois Mut. Fire Ins. Co. v. O'Neile*, 13 Ill. 89. 1851.

§ 30. The by-laws annexed to the policy provided

that prior insurance, unless expressed in the policy, should avoid it. In this case there was prior insurance not expressed in the policy. *Held*, that the policy was void; and that parol evidence was not admissible to show that the prior insurance was known to, and assented to, by the company, and that the policy was received by assured, supposing it contained a recital thereof. *Barrett v. Union Mut. Fire Ins. Co.* 7 Cush. Mass. 175. 1851.

§ 31. The policy was made payable in case of loss to Q. who assigned to another party. The policy was void, because of prior insurance not expressed in the policy. The point was made that the failure to insert the fact of prior insurance should not prejudice the plaintiffs, who were assignees, without notice. Not sustained. *Barrett v. Union Mut. Fire Ins. Co.* 7 Cush. Mass. 175. 1851.

§ 32. Mere knowledge of other insurance upon the part of agent of the company is of no avail to insured if not endorsed on the policy, a clause in the policy requiring such endorsement. Such knowledge is not a waiver of notice of such insurance. *Forbes v. Agawam Mut. Ins. Co.* 9 Cush. Mass. 470. 1852.

§ 33. Insurance by a mortgagee of his interest is not within the clause of a prior policy, in favor of the mortgagor, prohibiting him from making other insurance without notice; but, if such insurance is made at the expense of the mortgagor, and may be applied to his benefit, it is within the clause, and would avoid the prior policy. *Holbrook v. American Ins. Co.* 1 Curtis C. C. U. S. 193. 1852.

§ 34. A policy of insurance provided that "if assured should thereafter make any other insurance on the same property, and should not, with all reasonable diligence, give notice thereof, and have the same endorsed on the policy, or otherwise acknowledged by them in writing, the policy should be void." The insured subsequently took

out another policy in another company for \$1,500, and wrote to the defendants, advising them of the same, and received in writing an acknowledgment of his notice, subject to the following restriction: "That in event of damage or partial loss, the sum recoverable shall not, together with all insurance, exceed two-thirds of the cash value of the property insured, and at risk, at time of loss." There being no evidence that assured had ever assented to such restriction, it was *Held*, that the insurers had not reserved a right in the policy to declare it void, on receiving notice of another insurance on the same property, or to prescribe the terms and amount for which it should subsequently stand good. It merely required the insured, on effecting a subsequent insurance on the same property, to give notice thereof with reasonable diligence, and have the same endorsed on the policy, or otherwise acknowledged in writing. This the insured had done, and there being no clause in the policy other than that in acknowledgment referred to, restricting the liability of the company to two-thirds the value of the property, the assured might recover from defendants their proportion of the full value of the property destroyed, not exceeding the sum insured. *Westlake v. St. Lawrence County Mut. Ins. Co.* 14 Barb. N. Y. 206. 1852.

§ 35. A. owned a mill, and gave a bond to B. for one-half of it. At the time B. agreed with A. that the latter should insure B.'s half, for his own benefit, the money to apply in extinguishment of the debt, in case of loss. A. effected an insurance on the whole mill with defendants, whose charter prohibited a double insurance by any other company, "or from or by any other person or persons at the same time;" *Held*, that the agreement between A. and B. was not a double insurance within the meaning of the condition. *Burbank v. Rockingham Ins. Co.* 4 Fost. N. H. 550. 1852.

§ 36. Assured effected an insurance of two thousand dollars with defendants, whose charter provided, "that if

any other insurance shall be obtained on any property insured by this company, notice shall be given to the secretary, and the consent of the directors obtained, otherwise the policy issued by this company shall be void." Subsequently assured made an application, through agent of the defendants' company, for additional insurance of \$1,000. This application was taken to the secretary of the defendants by the agent, and secretary remarked that the defendants could not insure so much in one risk, but that the Union Company, in the same building, and of which he was also the secretary, would take it. There were then present two directors of the Union Company, and after examining application, they consented to take the risk. These directors were also directors in defendants' company. In an action on the defendants' policy, the defense being that the consent of the directors had not been obtained; *Held*, that the provision with reference to other insurance had been substantially complied with, and that parol evidence of the above fact was competent to show notice and consent. *Goodall v. New England Mut. Fire Ins. Co.* 5 Fost. N. H. 169. 1852.

§ 37. The conditions required notice to be given of subsequent insurance, and assent thereto endorsed on the policy, or it should become void. The application contained the following request: "Applicant asks leave to insure \$1,000 on same property in some other company. Please signify the assent of the company in the policy." This application was approved by an endorsement thereon, signed by a director, but the policy contained no expression of assent. *Held*, that no inference of assent could be inferred from the endorsement of the director, but rather the contrary. And further held, that a recital of the fact of prior insurance in the application would be notice to the company of such insurance; but that a recital of a wish to obtain subsequent insurance was not notice to the company of such insurance when obtained. *Forbes v. Agawam Mut. Fire Ins. Co.* 9 Cush. Mass. 470. 1852.

§ 38. The policy provided, that, "if the assured shall have already any other insurance against loss by fire on the property hereby insured, not notified to this company and mentioned in or endorsed on this policy, then this policy shall be void and of no effect." At time of application for this policy, assured mentioned to the agent the existence of another insurance in a New Hampshire company, and the agent made a note of it in a memorandum book, which contained other entries, relative to insurance and to private matters, but the policy was issued and accepted by assured without any consent therein expressed, as to the prior insurance. *Held*, that the policy was void and parol evidence of the notice to the agent was inadmissible, as tending to vary the terms of the written contract. *Pendar v. American Mut. Ins. Co.* 12 Cush. Mass. 469. 1853.

§ 39. The policy in this case prohibited any subsequent insurance, without notice and consent of the company, and required notice of all prior insurances. In the application, assured stated that there was then \$8,000 insured on the property, to wit: \$5,000 in the *Ætna*, and \$3,000 in the *Conway*; but, in fact, such insurances did not then exist, but were intended to be taken, and the agent of the company so informed at the time, who said to assured, that if this insurance of \$8,000 was subsequently effected in the offices named, or in any other offices, to the same amount, it would be sufficient. Afterwards the assured made additional insurance to the amount of \$8,000, not in the offices mentioned in the application, but in *Trenton* and *Lafayette* companies, and gave no further notice to the company or agent. *Held*, that the failure to notify the defendants of this subsequent insurance avoided the policy, and that evidence showing the knowledge of the agent was inadmissible. *Conway Tool Co. v. Hudson River Ins. Co.* 12 Cush. Mass. 144. 1853.

§ 40. Where the first policy prohibited a subsequent insurance, and a subsequent insurance was made by policy

conditioned to be void, in case of a prior insurance without notice; *Held*, that the second policy was void, if notice of a prior insurance was not given, and did not, therefore, avoid the first policy. *Schenck v. Mercer County Mut. Ins. Co.* 4 Zab. N. J. 447. 1854.

§ 41. Plaintiff issued a policy to Walsh for \$6,000, on one-fourth of a steamboat, said fourth valued at \$7,500, with stipulation "that, if any other insurance should be effected by which a greater amount than \$6,000 on this one-fourth of the steamboat should be insured, the policy should be void." Afterwards defendants procured insurance in another company upon one-fifth of three-fourths of said steamboat, valuing the said three-fourths at \$22,500, and stating that \$18,000 was already insured on the said three-fourths. This one-fifth, last procured, was estimated at \$4,500; and making in all \$22,500, the estimated value of the entire three-fourths of the boat; *Held*, that the first insurance was thereby increased fifteen hundred dollars contrary to express stipulation, and the policy was thereby avoided, *Columbus Ins. Co. v. Walsh*, 18 Mo. 229. 1853.

§ 42. A condition in the policy required notice of other insurance to be endorsed on the policy or otherwise acknowledged in writing. The insured took other insurance and gave a memorandum of it to the agent to be entered on the records of the company, the policy not being at hand, and the agent saying that such entry would answer every purpose. The agent afterwards returned the memorandum, saying that he had made such entry; but he had not in fact done so. *Held*, a violation of the condition. *Worcester Bank v. Hartford Fire Ins. Co.* 11 Cush. Mass. 265. 1853.

§ 43. One of the conditions of a policy issued by a mutual insurance company was, "that in case insurance shall subsist or be effected upon the premises or property insured by the company, in any other office, or from, by

or with any other person or persons, during the continuance of such insurance, the policy granted thereon by the company shall be void, unless such double insurance subsist with the consent of the directors, signified by endorsement on the back of the policy, signed by the president and secretary." It appeared by the pleadings that three separate sums were insured—on a building, on the machinery, and on the stock in it; and a second insurance, without the consent of the company, was effected on the building and machinery. *Held*, that by the terms of the condition, and of the statute under which this company was incorporated, the policy was wholly avoided, and not merely as to the property so doubly insured; and also, that it was immaterial that such second insurance was with a foreign company, and, therefore, not capable of being enforced here, as it was an insurance in fact made, and such as was intended to be prohibited by the condition. *Ramsay Woolen Cloth Manf. Co. v. Mutual Fire Ins. Co.* 11 Upper Canada, Q. B. 516. 1853.

§ 44. Where policy provided "that if any prior insurance exist on the property hereby insured, this policy shall be void, unless such prior insurance be endorsed on this policy when it issues," and at time of taking out such policy, assured held a prior policy on the same property; *Held*, that this endorsement, to wit: "Leave given to keep insured to an amount not exceeding three-fourths of the value of the property," written in the policy when it issued, included "prior" as well as "subsequent" insurances, and was a substantial compliance with the by-law, requiring notice of prior insurance. *Philbrook v. New England Mut. Ins. Co.* 37 Me. 137. 1853.

§ 45. A second policy, which is void, does not vacate a first policy, under provisions in the first which preclude a second insurance without notice and consent of the company, even though the underwriters of the void policy compromise and pay the loss. *Philbrook v. New England Mut. Ins. Co.* 37 Me. 137. 1853.

§ 46. Agent endorsed consent of company to additional insurance, when charter required that consent of directors must be obtained; *Held*, that company was not confined by their charter to a single secretary; that, whenever they directed any agent or officer to perform the appropriate duties of a secretary, they made such agent or officer secretary for that purpose; and evidence, showing the exercise of such authority on the agent's part, was admissible. *Peck v. New London County Mut. Ins. Co.* 22 Conn. 575. 1853.

§ 47. A policy was executed and delivered to assured with the understanding that it should not take effect until a prior policy in another company should be delivered up and cancelled. This was afterwards done, subsequent to the date of the latter policy. The subsequent policy contained a provision requiring prior insurance to be endorsed on it. *Held*, that as, by the understanding, the prior policy was to be cancelled before the subsequent policy went into effect, no endorsement of the former was required to be made on the latter. *Atlantic Mut. Fire Ins. Co. v. Goodall*, 9 Fost. N. H. 182. 1854.

§ 48. Where by-law required "notice of any other insurance" to be given, without specifying that such notice must be in writing; *Held*, that verbal notice to an agent soliciting risks, was sufficient; but mere knowledge of such other insurance, upon the part of such agent, would not be chargeable to the company. *Schenck v. Mercer County Mut. Ins. Co.* 4 Zabr. N. J. 447. 1854.

§ 49. Where policy was made subject to limitations and conditions annexed, and it was stipulated therein that a subsequent insurance, by any other company or person, without consent, should avoid the policy, and at time of issue an endorsement of \$3,000 insurance already made was written on the policy; *Held*, that a second insurance afterwards obtained without the knowledge or consent of the company avoided the policy, although it was to take

the place of the insurance existing at the time of issue of this policy, and was for a less amount. *Burt v. People's Mut. Ins. Co.* 2 Gray, Mass. 397. 1854.

§ 50. Where policy stipulated that "a subsequent insurance, without notice, should avoid the policy; *Held*, that a second insurance, effected subsequently by assured, without notice to first insurers, avoided the first policy. *Forbush v. Western Massachusetts Ins. Co.* 4 Gray, Mass. 337. 1855.

§ 51. Where a first policy prohibited any "increase of risk," and the insured increased the risk, by erecting a building connecting his house and barn; *Held*, that this policy was void. And where, subsequent to such increase of risk, and consequent avoidance of first policy, the assured took out the policy in suit, which required a disclosure of all prior insurance, and failed to make known the existence of the first policy; *Held*, that the first policy being at an end, and of no effect, did not avoid the second policy. *Jackson v. Farmers' Mut. Fire Ins. Co.* 5 Gray, Mass. 52. 1855.

§ 52. Assured took out a policy for \$3,000 on his mill, with the defendants, which policy provided "that notice of any prior or subsequent insurance must be endorsed on the policy." At the time of taking it there was already \$2,500 on the same mill in the City Insurance Company of Cincinnati, notice of which was given and consent for endorsed on defendant's policy. Subsequently, the policy in the City Insurance Company having expired, the assured had a new policy made for \$2,000, in another company, in place of the City Insurance Company's policy, but did not have this change endorsed on the policy in suit, although he verbally notified the agent of the company. *Held*, that the condition, requiring endorsement on policy of subsequent insurance, was a condition precedent; and that verbal notice was not a compliance with it. *Hutchinson v. Western Ins. Co.* 21 Mo. 97. 1855.

§ 53. When second policy issued, there was endorsed on the face of it, as well as in application, "\$2,000 on same property in the People's Mutual." *Held*, that this statement was not a continuing warranty, and was satisfied by the existence of such an insurance at time of issuing the second policy, though it might afterwards have expired, been cancelled or avoided by acts of assured. Also, that the first policy having been avoided by subsequent insurance without notice, the second policy was liable for the whole loss, notwithstanding its stipulation that, in case of other insurance, they would be liable only for their *pro rata* proportion. *Forbush v. Western Mass. Ins. Co.* 4 Gray, Mass. 337. 1855.

§ 54. M. having effected an insurance with a mutual company, assigned all his interest in the policy and premises insured to the plaintiffs by way of mortgage, to secure a debt, and the policy was duly ratified to them in accordance with the act of incorporation, which provided "that when any house or building shall be alienated by sale or otherwise, the policy shall thereupon be void," &c., "provided always that the grantee or alienee having the policy assigned to him may have the same ratified and confirmed to him for his own proper use and benefit," &c., "and by such ratification, shall be entitled to all the rights and privileges, and be subject to all the liabilities, to which the original party insured was entitled and subjected under this act." A loss having occurred, the plaintiffs sued in their own names as assignees, setting out the mortgage in the declaration. Defendants pleaded—3d, that the debt due the plaintiffs was less than the sum insured; that the assignment was to secure the debt; and that as to any surplus, plaintiffs held as trustees for the mortgagor; that before the loss, M. insured in another office for £500, which defendants had no notice of, and never consented to or approved of; 4th, that before the mortgage to the plaintiffs, M. had mortgaged the premises insured to one R. in fee, who afterwards effected an insurance with another company on his mortgagee interest, without the

knowledge and consent of the defendants; lastly, that before M.'s mortgage to the plaintiffs, he had mortgaged the premises insured to R. in fee, which mortgage is still in force and unsatisfied. *Held*, on demurrer, third and last pleas good; fourth plea bad; for although the mortgage to R. mentioned in it would form a good defense of itself, yet it was not relied on for that purpose, but stated only as incident to another and insufficient defense—viz: the insurance by R. on his mortgage—and therefore it could not be acted on as admitted by the demurrer. *Held* also, by Robinson, C. J., that the clause of policy above, applied only to absolute alienations, and the plaintiffs in this case, as mortgagees, were not entitled to sue in their own names. But, per McLean and Burns, J. J., *held*, that they were so entitled. *Burton v. Gore District Mut. Ins. Co.* 14 Upper Canada, Q. B. 342. 1856.

§ 55. M. effected an insurance on a vessel, “for account of owners as interest may appear,” for \$11,000, under policy containing provision as to other insurances as follows: “Warranted not to insure more than \$11,000, and in case of any excess over \$11,000, then this policy is to be void.” Subsequently two of the owners (being three in all) insured their interest in the same vessel to the amount of \$10,000, in other companies. *Held*, that, although the subsequent insurance was not upon the entire interest insured under the first policy, yet it was a violation of the warranties against further insurance contained in such prior policy, and it was therefore void. *Mussey v. Atlas Mut. Ins. Co.* 4 Kernan, N. Y. 79. 1856.

§ 56. A recitation of prior insurance, in the body of the policy, is a compliance with a condition requiring such insurance to be noted on the application or endorsed on the policy, or otherwise approved in writing by the secretary. *Ames v. New York Union Ins. Co.* 14 N. Y. 258. 1856.

§ 57. The policy contracted to pay and satisfy the

sum in case of loss, "according to the provisions of the act of incorporation and by-laws of the company." One section of the act made the policy void in case of double insurance not assented to. There was printed on the back of the policy a part of the act, but not the section relating to double insurance. *Held*, that the provisions of the act and of the by-laws were as binding as if recited in full in the policy; and that the policy in this case, there being other insurance not assented to, was void. *Fabyan v. Union Mut. Fire Ins. Co.* 33 N. H. 203. 1856.

§ 58. Other insurance, beyond the amount specified as allowable in the conditions of the policy, and without the consent of the insurers, renders the policy void. *Insurance Co. v. Stockbower*, 26 Penn. St. 199. 1856.

§ 59. Where charter of an insurance company contains a provision against double insurance, "without the consent of the directors endorsed on the policy," such other insurance, taken without the consent of the directors endorsed on the policy, avoids it. *Blanchard v. Atlantic Ins. Co.* 33 N. H. 9. 1856.

§ 60. A clause which provides that the policy shall become void, if any other insurance be made, which, together with this, shall exceed, &c., relates only to subsequent insurance. *Mussey v. Atlas Mut. Ins. Co.* 4 Kernan, N. Y. 79. 1856.

§ 61. The charter provided that "when a subsequent insurance shall be made by any other company or by any other person, on property insured at this office, without the consent of the president, in writing, and according to the terms in such consent expressed, it shall annul the said policy," &c. The assured effected a second insurance, and notified the president and secretary, who verbally consented to the same; *Held*, that the failure to obtain the "written" consent of the president, avoided the

policy, unless his verbal consent was a waiver of the by-law requiring it; but that he was an agent, with powers strictly limited and defined, and could not act so as to bind the defendants, beyond the scope of his authority. *Hale v. Mechanics' Mut. Fire Ins. Co.* 6 Gray, Mass. 169. 1856.

§ 62. Where a policy contained a condition which provided that it should be void if other insurance should not be endorsed on it; *Held*, that the existence of prior insurance did not make it absolutely void, but invalid, voidable and capable of being confirmed and made valid by acts of the company showing a waiver of the defect. *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328. 1857.

§ 63. In this case the policy was on "starch manufactory, including fixtures and machinery," and assured represented that he had two thousand dollars insurance on the property in Stevenson County Mutual Insurance Company, when in fact the insurance in the latter company was upon "starch manufactory" alone. *Held*, that the representation of other insurance on the same property was not untrue, as "starch manufactory" included fixtures and machinery. *Peoria Fire & Marine Ins. Co. v. Lewis*, 18 Ill. 553. 1857.

§ 64. When the facts are not in dispute, it is the province of the court to determine, as a question of law, what is reasonable diligence in giving notice of a subsequent insurance to the first insurers. *Kimball v. Howard Fire Ins. Co.* 8 Gray, Mass. 33. 1857.

§ 65. Where policy in stock company provided "that a subsequent insurance, without notice and consent, should avoid the policy," and a subsequent insurance of \$4,000, was taken on the same property by another company, without notice to or consent of the first company; *Held*, that the first policy was void. *Kimball v. Howard Fire Ins. Co.* 8 Gray, Mass. 33. 1857.

§ 66. These words in a second policy, "Other insurances permitted without notice until required; applies to prior, as well as to subsequent insurances, and policy is therefore valid, notwithstanding the existence of a prior insurance at the time of issue, not otherwise expressed, than by said words. *Kimball v. Howard Fire Ins. Co.* 8 Gray, Mass. 33. 1857.

§ 67. This clause in a policy, "If any subsequent insurance should be made upon the property hereby insured, which with the sum or sums already insured, should, in the opinion of the said Howard Fire Insurance Company, amount to an over insurance, said company reserve to themselves the right of canceling this policy by paying to the insured the unexpired premium *pro rata*;" has no reference to insurance on the property, procured without notice to the defendants, and without their assent. *Kimball v. Howard Fire Ins. Co.* 8 Gray, Mass. 33. 1857.

§ 68. Where policy required notice of any subsequent insurance, and an endorsement of it on the policy, or a written acknowledgment thereof from the company; *Held*, that evidence of a notice given to the agent of the company, of an "intention" to procure such subsequent insurance, would not prove a compliance with the condition, which required actual notice of the subsequent insurance after it was obtained. *Kimball v. Howard Fire Ins. Co.* 8 Gray, Mass. 33. 1857.

§ 69. Where policy requires the assured to give notice of subsequent insurance with all "reasonable diligence;" a notice, given after the destruction of the property by fire, and seven months subsequently to the date of the second policy, is not a compliance with the condition. *Kimball v. Howard Fire Ins. Co.* 8 Gray, Mass. 33. 1857.

§ 70. Where policy provided for notice of other insurance under penalty of forfeiture of the policy, if such

notice were not given; *Held*, that the stating of a wrong company in which such other insurance was procured would not avoid the policy, if the amount so stated was correct. *Benjamin v. Saratoga County Mut. Fire Ins. Co.* 17 N. Y. 415. 1858.

§ 71. One of the conditions of an insurance policy was, that if there should be any insurance at any other office, notice should be given, and the same endorsed on or stated in the policy, otherwise the first insurance should be void. *Held*, that an insurance effected in another office by an *interim* receipt, was an insurance within the condition; but as there was evidence to show that this fact had been notified to defendant's agent, who said it was not necessary to endorse it on the policy, until the policy on such receipt should be obtained, and as plaintiff could not avail himself of this fact under the pleadings, the court, instead of ordering a nonsuit on the leave reserved, granted a new trial with leave to amend. *Hatton v. Beacon Ins. Co.* 16 Upper Canada, Q. B. 316. 1858.

§ 72. Where the policy prohibited any subsequent insurance on the same property, without notice to and consent of the company; *Held*, that a second insurance, effected by a broker, who had also obtained the first insurance, without any notice to the company of such subsequent insurance, avoided the first policy; and that the mere knowledge of the broker, was not chargeable to the company. *Mellen v. Hamilton Fire Ins. Co.* 5 Duer, N. Y. 101. 1855. Affirmed, 17 N. Y. 609. 1858.

§ 73. Where policy required that notice of other insurances should be given with "reasonable diligence," and twenty days before the fire a second policy was taken out on the same property, of which no notice was given to first insurers, until after the fire; *Held*, that unexplained delay of nineteen days, was a conclusive proof of a want of that "reasonable diligence" which was necessary to be shown, to continue the policy in force. *Mellen v. Hamilton Fire*

Ins. Co. 5 Duer, N. Y. 101. 1855. Affirmed 17 N. Y. 609. 1858.

§ 74. To an action on a policy of insurance on a steamer against fire, defendants pleaded in their sixth plea, that by the policy the plaintiffs warranted that the total amount of said insurance on said steamer should not exceed three-fourths of her declared value, otherwise the policy should be void, and that the insurance on her far exceeded three-fourths of said value. The plaintiffs replied that the warranty referred to was to the effect that the total amount of insurance "against fire" should not exceed three-fourths of the declared value, and that such insurance did not exceed said value. *Held*, on demurrer, a good replication, and that defendants might have rejoined, re-affirming the condition to be as they had alleged, and denying that it was such as plaintiffs asserted. The seventh plea set up as a defense other insurances without notice to the defendants or having the same endorsed on their policy, and the plaintiffs replied that they gave due notice of such insurances to defendants, who neglected to endorse the same. *Held*, that the replication was bad. Noad v. Provincial Ins. Co. 18 Upper Canada, Q. B. 584. 1859.

§ 75. The third plea alleged that the plaintiff had effected another insurance in the Anchor Company, without notice to defendants or endorsement on their policy. The evidence showed that this policy was effected by one S. (whose interest in the property did not appear) in his own name, and assigned by him to B., who was also the assignee of policies issued to plaintiff. *Held*, that the plea was not proved, for the insurance complained of was not shown to be by or for the plaintiff, or of his interest, which would be necessary to avoid the plaintiff's policy. Park v. Phoenix Ins. Co. 19 Upper Canada, Q. B. 110. 1859.

§ 76. The taking of a policy of insurance, in renewal of a prior insurance, mentioned in the applica-

tion for a subsequent policy, is not within the terms or spirit of a provision, in the subsequent policy, requiring notice in case of making other insurances. *Brown v. Cattaraugus County Mut. Fire Ins. Co.* 18 N. Y. 385. 1858.

§ 77. A policy of insurance provided, "that in case of subsequent insurance of the same property, notice thereof should, with all reasonable diligence, be given to the company, &c., in default whereof the policy should be void." The assured made application to the surveyor of another company for an insurance of \$4,000, ten days before the fire, and paid the premium for the same, but received no policy, as the agent was not authorized to issue policies, but only to receive and forward applications to his company, which reserved the right of accepting or rejecting risks thus sent. At time of fire, the policy in second company had been made out and returned to surveyor, but had not been delivered to assured, or notice of its issue given to him, though the policy was afterwards delivered and \$3,000 of the amount insured, paid. The lower judge instructed the jury, that if there was no want of reasonable diligence in giving notice, the assured was not in default. *Held*, that this instruction was erroneous, there being no evidence that notice was ever in fact given, either before or after the fire. *Inland Ins. & Deposit Co. v. Stauffer*, 33 Penn. St. 397. 1859.

§ 78. To a declaration against a mutual insurance company on a policy of insurance against fire, defendants pleaded: 1st, that before the granting of the policy sued on, the plaintiff had insured with another company, to which the defendants never consented, nor was such consent endorsed on their policy. 2d, that after the defendants' policy was granted, the plaintiff effected an insurance with another company, without defendants' consent, and without having such consent endorsed on their policy. The plaintiff replied, on equitable grounds, to the first plea, that the insurance had been effected with the A.

company, which had failed, and the plaintiff notified the defendants thereof, and that said policy would not be renewed, to which defendants made no objection, but afterwards granted the policy sued on, and received from the plaintiff the assessments on his premium note. And to the second plea, that the plaintiff notified defendants' agent of the insurance there mentioned, so that he might endorse defendants' consent thereto on their policy, or notify the plaintiff if the defendants refused to do so, but that they did neither, and afterwards made the plaintiff pay assessments on his note. *Held*, on demurrer, replication bad, for under the act of incorporation, the policy was avoided by the acts pleaded, and the condition could not be waived by defendants' conduct. *Merritt v. Niagara Mut. Fire Ins. Co.* 18 Upper Canada, Q. B. 529. 1859.

§ 79. Where the policy on its face contained the stipulation that "\$25,000 is insured on the same property elsewhere," and it appeared at the trial that the amount insured was much less than this sum, but no such ground of defense was distinctly stated in the answer, nor suggested at the trial; *Held*, that it could not be taken advantage of at the argument before a full court upon the report of the presiding judge. *Denny v. Conway Stock & Mut. Ins. Co.* 13 Gray, Mass. 492. 1859.

§ 80. A provision in a policy of a mutual insurance company, that "persons insuring with this company may insure with other companies, with the consent of the directors endorsed on the policy," adopted by a board of directors acting under general power to control the business of the company, and printed on the back of all policies issued, is a valid condition, prohibitory in its character, and that a further insurance, therefore, without notice to and consent of the directors, avoids the policy. *Hygum v. Aetna Ins. Co.* 11 Iowa, 21. 1860.

§ 81. To an action on a policy of insurance, defend-

ants pleaded an insurance by the assured with another company, without notice to defendants, or endorsement thereof on their policy, contrary to one of the conditions. The assured replied, on equitable grounds, that he effected the insurance through N., their agent, residing at Elora; that when he effected the second insurance complained of, he had not received the policy from defendants, and had no notice or knowledge of said condition; that as soon as he became aware of it he gave notice to said N. that he had effected the insurance mentioned in the plea, and another insurance with the British Assurance Company, and as the insurance mentioned in the plea had been cancelled at the time of giving such notice, the said N. promised to have the insurance with the British Assurance Company endorsed on defendants' policy, and told the assured that it was not necessary to have the other noted, and that defendants' policy would still bind them; that after said notice defendants made a memorandum on their policy of the insurance with the British Assurance Company, and returned said policy to the assured as valid and subsisting; and defendants gave no notice to the assured that they considered said policy cancelled, because the omission to note the insurance in the plea mentioned arose from the neglect of the defendants and not of the assured; that at the time of the loss the assured had no other insurance except that with the British Assurance Company, and by reason of the premises defendants waived the endorsement of the insurance mentioned in the plea. It appeared that the policy was made at the head office in Montreal, on the 5th of June, and sent to N., the agent, about ten days before the fire, which took place on the 7th of July, but it remained with him, not being called for by the assured. On the 16th of June the assured obtained the policy pleaded, but it was cancelled on the 30th of June. N. was agent also for the British Assurance Company, and granted to assured a policy with that company about the same time as the defendants. On the 4th of July both of those policies were sent to the respective head offices to have each marked on the other, and defendants' consent

was noted on the 9th of July, and the policy returned. The agent knew of the policy pleaded, before the fire, but not until after it had been cancelled. *Held*, first, that the replication was not proved, for the omission to note the policy was not owing to the negligence of the defendants; they were not aware of it while it existed, and it would have been useless to note it after it had ceased; second, that the agent could not have waived the forfeiture; and third, that the replication should not have been admitted, and might be struck out under the C. L. P. A., Sec. 290. *Jacobs v. Equitable Ins. Co.* 17 Upper Canada, Q. B. 35. 1859. See same case affirmed, on new trial, 18 Upper Canada, Q. B. 14. 1859.

§ 82. A. took out policy on a saw mill with defendant, one condition of whose policy provided, "that a subsequent insurance without notice to them or endorsement on policy in writing should avoid the policy." Subsequently, and without notice to defendant, A. effected a further insurance in the Globe Insurance Company, whose policy also provided for a notice of any prior insurance on the same property; and A. failed to make known to Globe Insurance Company the insurance already made by defendant. A. held the policy of the Globe Insurance Company until after the fire, and brought suit upon it, which suit was settled by A.'s accepting the notes of the officers of the insurance company, which he still had in his possession at the time of this trial. *Held*, that as the insurance in the Globe Company was neither void nor voidable on its face, but merely voidable by the underwriters upon due proof of the facts, A. was bound to give notice thereof to the defendant, and having failed so to do, the policy was void. *Bigler v. New York Central Ins. Co.* 20 Barb. N. Y. 635. 1855. Affirmed, 22 N. Y. 402. 1860.

§ 83. Where prior insurance was notified to the company at the time the policy issued, the want of endorsement of such prior insurance on the policy, as required by

a condition of the policy, cannot be urged in a court of equity, in a cause otherwise free from objection, whatever effect it may have at law. *National Fire Ins. Co. v. Crane*, 16 Md. 260. 1860.

§ 84. Assured made application to defendant for insurance on his property, but not hearing from it, and supposing that they had overlooked it, effected an insurance in the Farmers' Mutual Insurance Company, but subsequently receiving the policy from defendant, which was prior in date to that of the Farmers' Mutual Company, and preferring to have his insurance in defendant's company, he went twice to surrender the policy in the Farmers' Mutual and fully intended to give it up, but had not done so at time of the fire, nor had he said anything of his intention to agent of defendant. *Held*, that the policy of defendant, issued upon assured's own application, could not be affected by any mere intention or secret determination of his own mind, not communicated to others. But policies contained a provision also against other insurance without notice or consent of the companies. *Held*, that the second policy was inoperative and invalid, because of the failure of assured to notify them of the first insurance, and it did not therefore avoid the first policy. *Gale v. Belknap Ins. Co.* 41 N. H. 170. 1860.

§ 85. Policy provided that, "if the assured or his assigns shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this company and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, then this policy shall cease and be of no further effect." Subsequent to the taking of this policy the agents of the plaintiff procured an insurance on the same property in the Liverpool and London Insurance Company, of which no notice was given to or consent of defendants obtained, nor was notice given to the Liverpool and London Insurance Company, as required by a condition of its policy, of the prior insurances in defendants'

company. Plaintiff claimed that the Liverpool and London policy was void, by the terms of its condition requiring notice of prior insurance, and that it did not, therefore, avoid defendants' policy; and further, that such insurance in the London and Liverpool office, was made without his knowledge; but the Court held, that there had been a violation of the condition in defendants' policy, whether such policy in Liverpool and London were valid or invalid, or whether plaintiff knew of such other insurance or not. *Campbell v. Ætna Ins. Co.* Decided in Sup. Ct. Halifax, Nova Scotia, May 31, 1860.

§ 86. This case already reported, *ante*, § 81, coming up again, and the jury having a second time found for the plaintiff, a new trial was granted without costs. The only plea was a further insurance effected by the plaintiff, without notice to defendants or endorsement on their policy, on which issue was taken, and at the trial, defendants admitted, that if they should fail to prove their defense the plaintiff would be entitled to a verdict for the full amount insured. *Held*, that defendants were entitled to begin. The further insurance having subsisted for fourteen days only before it was cancelled, it was argued that a reasonable time must be allowed to give notice of it to defendants, and procure the endorsement, and that this was a question for the jury; but, *Held*, that the question was not properly presented by the pleadings, and that the plaintiff having given no notice at all, though he had ample time to do it, the question of reasonable time could not arise. It was contended also that the second insurance was void, by reason of plaintiff's failing to notify them of his first insurances, but held that it was nevertheless an insurance within the meaning of the condition in defendant's policy. *Jacobs v. Equitable Ins. Co.* 19 Upper Canada, Q. B. 250. 1860. Same case finally disposed of as above in 19 Upper Canada, Q. B. 257. 1860.

§ 87. The by-laws provided that "if a previous

policy exists, and is not disclosed, the policy in this company will be void." *Held*, that a previous insurance effected by a third party, (who had an interest in the property,) in the name of the assured, but without their knowledge or consent, was not in violation of the above provision. *Nichols v. Fayette Mut. Fire Ins. Co.* 1 Allen, Mass. 63. 1861.

§ 88. Policy with defendants was issued December 27th, 1852, for \$10,000, apportioned as follows: \$5,000 on building, \$2,000 on stock, and \$3,000 on machinery. One condition of the policy was as follows: "All persons having property insured by this company, must with reasonable diligence, give notice of all additional insurances made in their behalf on the same, whether by this company or by other insurers; and of all changes that may be made in such additional insurances; and cause such notice to be endorsed on their policies; and each company shall be liable to the payment only of a ratable portion of any loss or damage which may be sustained; and unless such notice is given, the insured will not be entitled to recover in case of loss." In compliance with above condition, assured gave notice on 14th December, 1853, of an additional insurance in the "Royal Insurance Company," divided as follows: on buildings, \$1,000; on stock, \$2,000; on machinery, \$7,000. These policies expired—the defendants' on the 27th December, 1853; that of the Royal Insurance Company on the 2d December, 1854. On the 5th January, 1857, the defendants renewed their policy, by endorsement on the original policy, to the amount of \$5,000, as follows: on building, \$500; on machinery, \$3,500; on stock, \$1,000; and on 5th January, 1858, renewed it again for same amount and with same distribution. During the existence of these two renewal policies no notice was given by assured of an insurance of \$10,000, which had been effected in the "Royal" in December, 1856. It was not discovered till after the fire of 19th of August, 1858, when it appeared that there was an insurance in the "Royal," not as it existed under the

former policy of same company in 1853, but with the amounts on stock, building and machinery differently apportioned; *Held*, that the failure of assured to give notice of the changes in the amounts insured on the several subjects, in the Royal Insurance Company, was in violation of above condition in defendants' policy, and a bar to any recovery in an action on the policy; and that a waiver of the performance of the condition relative to notice of "changes made in additional insurances," could not be inferred from the receipt of information of the mere fact of an additional insurance, where there was no intimation whatever given of any change. *Simpson v. Pennsylvania Fire Ins. Co.* 38 Penn. St. 250. 1861.

§ 89. Where policy required notice to be given on all prior insurance, and endorsement of the same on the policy, and assured, at the time of the insurance, gave written notice of a prior existing insurance, which the company failed to endorse on the policy issued; *Held*, that the company was estopped from setting up such prior insurance, as a defense to an action on the policy. *Foote v. North Western Ins. Co.* New York Supreme Court, General Term, 1862. "Commercial and Insurance Journal," Pha.

§ 90. Action on policy. Defense, other insurance, not notified to insurer as required by the conditions of the policy sued on. Reply, that such other insurance was void for non-compliance with certain conditions. *Held*, that when the policy for such other insurance was apparently valid on the face, and could only be shown to be void by pleading matters in avoidance, it was to be deemed only voidable; that the privilege of pleading such matters in avoidance appertained solely to the company which issued the policy; that the plaintiff in this action was not entitled to set up such matters. *David v. Hartford Fire Ins. Co.* Supreme Court of Iowa, April Term, 1862.

§ 91. To constitute a case of double insurance, the

risks must be on the same property, and the liability in each case must be the same. An insured may take policies upon different parts of the same building, or of the merchandise within the building, or upon different interests in both, without effecting a double insurance. *Roots v. Cincinnati Ins. Co.* 1 Disn. Ohio, 138. 1856.

§ 92. A policy of insurance upon "carpenter's shop and carpenter's tools" provided that the issuing of any other policy covering any portion of the property insured, and not disclosed, should avoid the policy. *Held*, that evidence of the issuing of another policy to the same person upon "four chests of carpenter's tools in wood shop," described as situated in the same street as in the first policy, and that there were in the shop two chests of tools belonging to the assured, and two or perhaps three belonging to their journeymen, did not show that any part of the property was covered by both policies. *Clark v. Hamilton Mut. Ins. Co.* 9 Gray, Mass. 148. 1857.

§ 93. A clause in a policy permitting other insurance without notice until required, applies to insurance already existing on the property, notwithstanding that the policy provides that "in case the assured shall have already any other insurance against loss by fire on the property hereby insured, not notified to this company and mentioned in or endorsed upon this policy," the policy shall be void and of no effect. *Blake v. Exchange Mut. Ins. Co.* 12 Gray, Mass. 265. 1858.

§ 94. The words "privilege for \$4,500 additional insurance," written in the body of a policy of insurance, will operate as a waiver within that amount, of a subsequent printed condition in the policy requiring notice to be given to the insurers of any other insurance, and to have the same indorsed on the policy. The true intent and meaning is that the insured may obtain further insurance without notice to the company, and without affecting their policy or their liability upon it, provided such

additional insurance does not exceed \$4,500. *Benedict v. Ocean Ins. Co.* 1 *Daly*, N. Y. 8. 1860.

§ 95. A stipulation in a policy of insurance, that the insurance shall be void, in case the assured, or any other person with his knowledge, shall have existing, during the continuance of the policy, any other insurance on the property, not notified to the insurers and mentioned in, or indorsed upon, the policy, is a material part of the contract between the parties. *Gilbert v. Phoenix Ins. Co.* 36 *Barb.* N. Y. 372. 1862.

§ 96. A policy of insurance which contains a provision that if the assured "shall hereafter make any other insurance on the property insured, and shall not obtain the consent of this company thereto, or have such consent endorsed upon this policy, then this insurance shall be void and of no effect," is not defeated by the taking of a subsequent policy upon the same and other property, which is invalid by reason of a failure to disclose certain essential facts, although such consent is not so endorsed upon it, or obtained of the company. And the assured may set up the invalidity of the second policy, although after the loss they had the defendants' consent thereto endorsed upon another similar policy issued by them, upon the other property, which that policy covered, and although they had received the full amount of the invalid policy from the insurers. *Hardy v. Union Mut. Fire Ins. Co.* 4 *Allen*, Mass. 217. 1862.

§ 97. Though by the policy the assured were required to give notice of all additional insurances made in their behalf, an omission to give notice of an additional insurance not on the same property, will not prevent a recovery. *Franklin Fire Ins. Co. v. Updegraff*, 43 *Penn. St.* 350. 1862.

§ 98. A condition (made a part of the contract) that notices of all previous insurances upon the property shall

be given to the insurers and endorsed upon the policy, or otherwise acknowledged in writing, at or before the time of making the insurance, otherwise the policy shall be void; and a similar condition in reference to subsequent insurances; together with a stipulation in the body of the policy that the insurance shall be void in case the insured shall have any other insurance on the property, during the continuance of the policy, not notified to the insurers and mentioned in, or endorsed upon, the policy, constitute a valid agreement; and the failure of the insured to have other insurances effected by him, mentioned in or endorsed upon the policy, or acknowledged in writing, will render the policy void. *Gilbert v. Phoenix Ins. Co.* 36 Barb. N. Y. 372. 1862.

§ 99. Where a policy was issued upon the condition that it should become void if additional insurance was obtained without notice; *Held*, that a policy which upon its face was valid, and the amount of which had upon a loss happening been paid, constituted such additional insurance; although it might have been avoided by the company granting it by means of extrinsic evidence. *David v. Hartford Ins. Co.* 13 Iowa, 69. 1862.

§ 100. A policy issued for \$5,000 upon merchandise held on trust and commission, provided that in case of plurality of insurance the company should be liable for such proportion of the loss to the subject insured as the amount insured by the company should bear to the whole amount insured thereon. The insured also held another policy for \$4,000 on merchandise held on trust and commission, and on storage. A loss happened to the amount of \$9,157, of which \$7,470 was merchandise held on commission, and \$1,687 held on storage. *Held*, that the insured was entitled to recover the whole amount of the \$5,000 policy. *Angelrodt v. Delaware Mut. Ins. Co.* 31 Mo. 593. 1868.

§ 101. L. was insured in a Baltimore company on his

own goods, and in sundry foreign companies on his own goods and goods held on commission. The policy in the first company contained a clause that "the insured shall not in case of loss or damage be entitled to demand or recover on this policy any greater proportion of the loss sustained than the amount hereby insured shall bear to the whole amount of the several insurances." The whole insurances were insufficient to cover the value of the goods lost. The Baltimore company refused to pay more than the proportion of the losses as stated in the above clause; *Held*, that the foreign policies were not within the effect of the covenant relating to other insurances, and that the Baltimore company was not entitled to any abatement of its liability on its policy by reason of such other insurance. *Baltimore Fire Ins. Co. v. Loney*, 20 Md. 20. 1862.

§ 102. On the first of May, 1852, the defendant insured the plaintiff's stock in trade in a store for \$2,500 for three years. A clause of the policy provided that "in case any other policy of insurance had been or shall be issued covering the whole or any portion of the property insured by this company," the policy issued by the defendant should be void, unless the company had notice thereof, and gave a written consent thereto. In August, 1854, the goods were, with the consent of the defendant, removed to an adjoining store, in the same building, known as No. 148. At that time the insured had a stock of goods of the same description in No. 148, which had been insured for \$2,500 by another company, January 12, 1852, for five years. The defendants gave no consent to such prior insurance, and had no knowledge of it. *Held*, not a case of double insurance, in violation of the condition of the policy. *Vose v. Hamilton Mut. Ins. Co.* 39 Barb. N. Y. 302. 1862.

§ 103. The negotiation of a void policy is not a breach of the condition against further insurance without notice, so as to avoid a previously subsisting policy. *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520. 1863.

§ 104. Where a mortgage interest was intended to be insured, but the policy was issued to the mortgagor, loss if any payable to the mortgagee, and a condition of the policy provided that it should become void if any further insurance was obtained on the property insured, without the consent of the insurance company endorsed on the policy, and the mortgagor procured a later insurance of the property of which no notice was given to the company, and of which the party originally insured had no knowledge; *Held*, that as the original insurance was intended as an insurance of the mortgage interest of the insured, and was to be regarded as equitably such, the later insurance was not a further insurance of the same property, and not a breach of the condition. *Woodbury Savings Bank v. Charter Oak Ins. Co.* 31 Conn. 518. 1863.

§ 105. The policy sued on contained a clause providing that if the insured should procure any other insurance, and should not with all reasonable diligence give notice to the company, and have the same endorsed on the policy or otherwise acknowledged in writing, that the policy should cease and be of no further effect. The application upon which the policy was issued was for insurance to the amount of \$10,000. The agent of the defendant stated to the plaintiff, that by its rules the company could take but \$5,000 on any one risk, and offered to procure the insurance for the remaining \$5,000, which he did the next day, and notified the defendant, who did not object. The premium was subsequently paid and the policy delivered. *Held*, that it was the duty of the company, upon being notified by its own agent of the additional insurance, to endorse the same upon the plaintiff's policy, or to notify him of the refusal of the risk, and that, having failed so to do, it was estopped from setting up as a defence the failure to have such additional insurance endorsed upon the policy. *Horwitz v. Equitable Mut. Ins. Co.* 40 Mo. 557. 1867.

§ 106. Stipulations in a policy that it should be void

in case of any other insurance not mentioned or endorsed on it, or in case of any subsequent insurance without notice to the insurer and endorsed upon the policy, or the notice acknowledged in writing, must be strictly observed. If violated by the insured he cannot recover on the policy in case of loss. *Deitz v. Mound City Mut. Fire & Life Ins. Co.* 38 Mo. 85. 1866.

§ 107. Where the assured makes two or more insurances on the same subject, risk and interest, it is a case of double insurance. *Sloat v. Royal Ins. Co.* 49 Penn. St. 14. 1865.

§ 108. Where one policy of insurance in one company covers the building only of the party insured, and a subsequent policy in another company covers the building, machinery, shafting, belting, tools, lathe, planes, drills, and stock finished and unfinished, it is not a case of double insurance, and is not within the meaning of a clause in the former policy prohibiting double insurances without notice to the insurer. *Sloat v. Royal Ins. Co.* 49 Penn. St. 14. 1865.

§ 109. Where policies, which are alleged to create an over-insurance, are void at the time of the loss, they are no obstacle to a recovery on the policy on which the claim is made; but if voidable only for some breach of condition for which the insurers might avoid them, but which they have waived, the over-insurance exists. *Mitchell v. Lyscoming Mut. Ins. Co.* 51 Penn. St. 402. 1865.

§ 110. An insurance policy issued by the New England Company, provided that if the insured should have existing, during the continuance of that policy, any other insurance not consented to by that company in writing, and mentioned in or endorsed upon the policy, then the insurance by that company should be void. *Held*, that although the assured had existing, during a portion of the term embraced in such policy, other insurance, not consented to

by the New England Company, either in writing or verbally, still, if such other insurance had ceased to exist at the time of the loss which the assured was seeking to recover of the New England Company, his right of recovery would not be affected. *New England Fire & Marine Ins. Co. v. Schettler*, 38 Ill. 166. 1865.

§ 111. A fire policy, by an insurance company, through its agent, contained a provision, that if the assured should thereafter make any insurance on the property described therein, and should not give notice thereof to the company, and have the same endorsed on the policy, or otherwise acknowledged by the company in writing, the policy should be of no further effect. The assured afterwards handed the policy to an agent of the company, who was authorized to receive applications, issue policies and receive premiums, and applied to him for additional insurance on the property in other companies, for which he was also agent, and the agent, before receiving the premiums for the additional insurance, or delivering the policies therefor, inserted in the first-mentioned policy the words, "other insurance permitted without notice, until required. J. C. M." *Held*, that the insertion of such clause was within the scope of the agent's authority; and that the procuring of further insurance without any other notice to the company, did not work a forfeiture of the policy. *Warner v. Peoria Marine & Fire Ins. Co.* 14 Wis. 318.

See Agent, § 63. Contribution, 1, 5, 10, 11. Burden of Proof, 7. Endorsements, 1. Entirety and Divisibility of Policy, 4, 7. Interest in Policy, 11. Questions for Court and Jury, 3. Responsibility of Assignee for Acts of Assignor, 3, 4, 12. Subrogation, 3. Warranty and Representation, 7.

PAROL CONTRACT.

§ 1. Open policy executed. Agent orally agreed, afterwards, to insure under the policy certain bales of cotton for additional premium, which was not endorsed on the policy. *Held*, a binding contract. *Kennebec Co. v. Augusta Ins. Co.* 6 Gray, Mass. 204. 1856.

§ 2. Plaintiff insured his stock of goods for \$800, in No. 21 D Avenue, and whilst the policy was in force, removed them to No. 371 Grand Street. He notified the company of this change, and left the policy at the office for the purpose of having the risk transferred, and there was, upon the trial, evidence tending to show an acquiescence on the part of the company in the change. The act of incorporation conferred upon the president, or other person appointed by the board of directors for that purpose, the power to make contracts of insurance, the policies issued in pursuance of such contracts, to be signed by the president and countersigned by the secretary, and such policies to be binding upon the company in like manner as if made under seal of the company. *Held*, that under the act of incorporation of this company, no contract, either parol, or written, could be binding, unless it had received the signature of the president, secretary, or other person formally designated by a majority of the directors; that by the removal of the goods, the policy became inoperative; and that parol evidence to show a verbal agreement to transfer the risk to the new location, was incompetent, as no such agreement could be binding, unless signed by the president, and countersigned by the secretary. *Spitzer v. St. Marks Ins. Co.* 6 Duer, N. Y. 6. 1856.

§ 3. If a valid agreement to insure and deliver a policy was made, under which the company are liable for the loss sought to be recovered, no judgment should be given, except that the plaintiff recover the amount of the loss, not exceeding the sum insured, and such an action is one which the code in New York requires should be tried by a jury. *Rockwell v. Hartford Fire Ins. Co.* 4 Abb. N. Y. 179. 1857.

§ 4. Policy was issued to "Benjamin, agent." Benjamin was one of a company owning the property insured, and held a mortgage on it for nine thousand dollars. Afterwards, the mortgage was foreclosed, and the property bid in by Benjamin on his debt. Benjamin then made a contract to sell the property to another party, and upon notifying the company of this fact, they consented that the policy should remain valid, until the title should be perfected in the vendee. *Held*, that the legal effect of this change of ownership, and the consent of the defendants after notice of such change, was to create a new contract between the parties, and that the old policy, thereafter, became as effectual for his indemnity, as a new policy is, sued in his own name, and describing him as the owner could have been. *Benjamin v. Saratoga County Mut. Ins. Co.* 17 N. Y. 415. 1858.

§ 5. The fifth section of charter of the company provided, that "all policies, or contracts founded thereon, shall be subscribed by the president and attested by the secretary, and the said company shall be liable for all loss or damage by fire, or other casualty, agreeable to the terms thereof." The sixth section provided "that every person who shall become a member by effecting insurance, shall, before he receives his policy, deposit his promissory note for such a sum of money as shall be determined by the directors." The eighth section provided "that every member of said company shall be bound to pay for losses, and in proportion to the amount of his deposit note, and the company shall have a lien on the building insured to the

amount of the notes, when they shall file a memorandum with the clerk of the county." An agreement had been made with the secretary of this company for insurance of the property, and applicant proposed to pay the premium, but the secretary said, "never mind, pay it some other time;" and further said that he would be insured from that day. On the 18th of April the policy was filled up, and on the 20th, secretary wrote to applicant, requesting him to sign and return the note enclosed, and send the cash percentage, \$7.20. This letter was put in the mail on the 21st, and on the 22d, before applicant had an opportunity of answering, the property was destroyed; but on same day he tendered the premium note and cash percentage, in person, at the office of the company; which being refused, this suit was brought in equity to compel performance of agreement, and obtain relief. *Held*, that the deposit of the note was a condition precedent, without which no one can become a member; and no one can be insured directly or indirectly, without becoming a member, or at least without placing himself in a situation so that he is entitled to be a member, and is prevented by fault of the company; and the facts not showing such fault, in this case, the relief prayed for could not be granted. *Belleville Mut. Ins. Co. v. Van Winkle*, 1 Beasley, N. J. 333. 1858.

§ 6. The plaintiff effected an insurance with the defendants, and, after the policy had run for one year, the treasurer of the plaintiff and president of the company made an agreement to continue the risk, as permanent, until one party gave notice to the other of a desire to terminate the agreement. Relying upon such arrangement, the treasurer gave himself no further concern about the renewal of the policy than to take the receipt when handed to him by the president, and pay the premium when convenient. The last renewal receipt had been made out in July, 1847, and before the receipt for the next year was received or the premium paid, the church was destroyed by fire. *Held*, that this agreement between the president

and treasurer was not void, as against the statute of frauds, but was a valid parol contract. Trustees First Baptist Church v. Brooklyn Fire Ins. Co. 19 N. Y. 305. 1859. This case purports to reverse the decision of the court below; but in case of same style in 18 Barb. 69, the same conclusion as above is there reached also.

§ 7. A contract of insurance against fire may be made and proved without writing. A transfer, although notarial, of a mortgage, the subject of insurance, does not destroy the insurable interest then existing, a *contre-lettre sous seing privé* from the transferee, showing that the transfer was nominal. A clause in the acts constituting the charter of an incorporated insurance company, providing "that all policies of assurance whatever, made under the authority of this act or of the ordinance aforesaid, which shall be subscribed by any three directors of said corporation, and countersigned by the secretary and manager, and shall be under the seal of the corporation, shall be binding upon the corporation, though not subscribed in the presence of a board of trustees, provided such policies be made and subscribed in conformity to a by-law of the corporation," does not exclude other means of proving a contract of insurance, consented to by them. Interest on the amount insured may be awarded from the day of the loss. Montreal Assurance Co. v. McGillivray, 8 Lower Canada, Q. B. Appeal Side, 401. 1858. Reversed, 9 Lower Canada, 488. 1859.

§ 8. Under an oral contract of insurance, the insured may recover for a loss, although after it occurred, and while the insurers were ignorant of it, he paid them the premium, and received from them in lieu of such subsisting contract, a written policy which was not binding on the insurers by reason of not being countersigned by one of their officers as was required in the body of it. Kelly v. Commonwealth Ins. Co. 10 Bosw. N. Y. 82. 1862.

§ 9. A mere demand of the premium, without insisting upon it, or tendering a valid policy, will not termi-

nate a subsisting oral contract of insurance. *Kelly v. Commonwealth Ins. Co.* 10 Bosw. N. Y. 82. 1862.

§ 10. A mere oral contract of insurance, supported by a sufficient consideration, which is to take effect forthwith, although it may be entered into contemporaneously with an agreement by the insurers to deliver, and the assured to accept subsequently, as a substitute therefor, a written policy by the former in the form usually adopted by them, becomes binding and remains in force until the delivery or tender of such policy. Until then, the condition usually inserted in such policies, requiring prepayment of the premium to make them binding, unless expressly adopted by the parties in such oral contract, forms no part of the contract of insurance between them. *Kelly v. Commonwealth Ins. Co.* 10 Bosw. N. Y. 82. 1862.

§ 11. An application for the insurance against fire of certain engravings similar in all respects to others on which the insurer had recently issued a policy to the same applicant, was made on Saturday: the parties agreed verbally upon all the terms of such insurance except the rate of premium; the previous insurance was mentioned in the conversation, and the insurer promised to make out a policy and send to the assured on the next Monday morning. *Held*, that the jury might well find a present contract to insure at the former rate of premium and to furnish the written evidence on Monday, and that upon such finding, a recovery for a loss happening on the intervening Sunday might be had. *Audubon v. Excelsior Ins. Co.* 27 N. Y. 216. 1863.

§ 12. Under a provision in the charter of an insurance company, "that all policies of insurance made by the corporation shall be subscribed by the president, or, in case of his death or absence, by the vice-president, and countersigned and sealed by the secretary of the company:" a contract or agreement to execute a policy of insurance is not within the terms of the charter, and may be valid though made by an agent verbally. *City of*

Davenport v. Peoria Marine & Fire Ins. Co. 17 Iowa, 276. 1864.

§ 13. In 1860, contracts of insurance were not required by law to be in writing, but they may be under the revenue laws passed since that date imposing a stamp duty thereon. *Western Massachusetts Ins. Co. v. Duffey*, 2 Kansas, 347. 1864.

§ 14. It is competent to prove a usage, that where there has been a verbal agreement for insurance, and the terms agreed upon and entered in the books of the company, the contract for insurance is considered as valid for the insured, although the premium is not paid. *Baxter v. Massasoit Ins. Co.* 13 Allen, Mass. 320. 1866.

§ 15. In an action against an insurance company, upon a policy of insurance, and also upon an agreement to insure, if it appears that a policy has been filled out and never delivered, but retained in the possession of the defendants' agent, and it is in dispute whether it was filled out in pursuance of any previous completed agreement as to the terms of insurance, and there is evidence tending to show that the defendants' agent, under authority conferred upon him, agreed to insure the property of the plaintiff, and accordingly filled out a policy for that purpose, and took it to the office of the plaintiff's agent to deliver it to him and receive the premium, but did not find him and therefore retained the policy until the destruction of the property by fire, which was about a month afterwards, the judge is not bound to rule as a matter of law, "that the purpose and time of operation of the arrangement respecting the policy had expired" before the loss, but it should be left, under instructions, to the jury to determine whether or not the contract was at an end. *Baxter v. Massasoit Ins. Co.* 13 Allen, Mass. 320. 1866.

See Agent, § 27. Consummation of Contract, 6, 24. Evidence, 73. Payment of Premium, 6. Pleading and Practice, 53. Who May Sue, 27.

PAROL EVIDENCE.

§ 1. Parol evidence of verbal representation, as to the value of the subject to be insured, made by the assured at the time of effecting the insurance, is inadmissible. *New York Gas Light Co. v. Mechanics' Fire Ins. Co.* 2 Hall, N. Y. 108. 1829.

§ 2. In an action on a policy of insurance, notice to the attorney of the corporation, to produce their books, binds the principal, whoever may be its officers, or in whose custody soever the books may be; and on failure to produce the books on such notice, parol evidence as to the choice of directors of the defendant corporation, and of the acts and doings of such directors, is admissible. *Thayer v. Middlesex Mut. Fire Ins. Co.* 10 Pick. Mass. 326. 1830.

§ 3. Policy of insurance against fire provided "that a misdescription of the materials and roofs of buildings, so that the same should be taken at a lower rate than if truly described, should avoid the policy." Assured minutely described the situation and construction of his brick ice-house, surrounded and covered by wood, to the secretary, who, in reducing the description to writing, omitted to say anything concerning the outside wooden frames; and in an action on policy, company set up in defence a misdescription of the premises in the policy. *Held*, that parol evidence was admissible to show that the building was truly described; and that the misdescription, if any, arose from the mistake of the secretary of the insurers. *Moliere v. Pennsylvania Fire Ins. Co.* 5 Rawle, Pa. 342. 1835.

§ 4. Parol evidence is admissible to show the extent of the interest intended to be protected by a policy, if it does not contradict the terms of the policy itself. *Franklin Ins. Co. v. Drake*, 2 B. Monroe, Ky. 47. 1841.

§ 5. Policy was for "£1,000 on oil mill; on fixed machinery and millwright works therein, £1,000; on engine house adjoining the mill, £200; on steam engine therein, £300; on logwood warehouse, in which chopping dye-wood is performed, communicating with the mill, £200; on warehouse on the other side of the mill, to the east side, merely for storing goods, £300;" *Held*, that there was no ambiguity in the policy, and that evidence to show that it was intended to insure the machinery and gear in the logwood warehouse, was inadmissible. *Hare v. Barstow*, 8 Jurist, 928. 1844.

§ 6. Where policy is express as to the subject of the insurance, the court will not change the contract, and make one for the parties, and apply the insurance to chattels not insured, because the assured intended to insure them, nor admit parol evidence to alter its provisions. *Holmes v. Charlestown Mut. Fire Ins. Co.* 10 Met. Mass. 211. 1845.

§ 7. Where the application was referred to and made part of the policy, and the assured introduced evidence to prove that he truly informed the agent of the insurer, who prepared the application, as to certain particulars not stated therein; *Held*, that such evidence was inadmissible. *Jennings v. Chenango County Mut. Ins. Co.* 2 Denio, N. Y. 75. 1846.

§ 8. In a suit on a policy the insurance company will not be permitted to show a verbal agreement to make certain changes whereby the risk would be diminished, and the non-performance of such agreement. Both parties must stand by the contract as written. The subject of

promissory representations discussed by Ch. Walworth. *Alston v. Mechanics' Mut. Ins. Co.* 4 Hill, N. Y. 329. 1842. Reversing 1 Hill, N. Y. 510. 1841.

§ 9. The original insured made representations, in regard to lamps in picking room, in 1834. The policy was renewed in favor of various parties up to 1846, when loss occurred; the last policy reciting that the insurance was made on representations of assured contained in his application. Parol evidence held admissible, to show that the original application by the first assured was the document referred to. *Clark v. Manufacturers' Ins. Co.* 2 Wood. & Minot, C. C. U. S. 472. 1847. 8 How. U. S. 235. 1850.

§ 10. No usage of the company, nor even the express agreement of the parties, whether made previous to or at the time of the execution of the policy, can be admitted to explain, modify or control the written contract. *Illinois Mut. Ins. Co. v. O'Neile*, 13 Ill. 89. 1851.

§ 11. Policy was issued to S. on a hotel in Massachusetts. On the same day S. conveyed the premises to the plaintiff by a deed absolute on its face. On the 4th of the same month, S., with the assent of the company, assigned the policy to the plaintiff "as a collateral security." *Held*, that parol evidence was admissible to show that such deed was intended as a mortgage, and that S. retained, therefore, an insurable interest in the property. *Hodges v. Tennessee Marine & Fire Ins. Co.* 4 Selden, N. Y. 416. 1853.

§ 12. Parol evidence of a conversation between the parties at the time the policy was made, as to the night watch to be kept upon the premises, and that, by the express terms of the agreement, the "night watch" was to have the care and watching of no other premises at the same time, but that he was to be the exclusive watch of the plaintiffs upon their premises; *Held*, inadmissible to

vary the necessary legal effect, or the terms of the contract. *Hovey v. American Mut. Ins. Co.* 2 Duer, N. Y. 554. 1853.

§ 13. Parol evidence is not admissible to vary or explain the terms of a policy and survey, where the latter has been made part of the contract, and there is no ambiguity in either. *Glendale Woolen Manufacturing Co. v. Protection Ins. Co.* 21 Conn. 19. 1851. *Sheldon v. Hartford Fire Ins. Co.* 22 Conn. 235. 1853.

§ 14. Parol evidence to show that an agent and director of the company made a survey of the premises insured, filled up the application, and knew of the existence of a certain fact, which was set forth as an avoidance of the policy, is held inadmissible. So also, is evidence to show, that the fact relied upon was not an increase of risk, where, by the express terms of the policy, such fact was made material by being classed among the specially forbidden occupations. *Lee v. Howard Fire Ins. Co.* 3 Gray, Mass. 583. 1854.

§ 15. In an action on a policy which was endorsed, "This company will not be liable for any statement made to an agent, unless contained in the application;" *Held*, that parol evidence was inadmissible to show, that the assured mentioned a certain deed of trust to the agent of the company at the time of his application, and that the agent refused to write it down, saying that the amount was too trifling. *Loehner v. Home Mut. Ins. Co.* 17 Mo. 247. 1852. *Affirmed* 19 Mo. 628. 1854.

§ 16. Evidence of verbal communications of facts, made to an agent only authorized to receive and forward applications, is inadmissible to vary the terms of the written application. *Wilson v. Conway Fire Ins. Co.* 4 R. I. 141. 1856.

§ 17. Where policy stipulated that, in case applica-

tion is made through an agent, the applicant shall be held liable for the representations of such agent; parolevidence, that the true state of the title, which was that of mortgagee insured absolutely, was made known to the company's secretary and one of the directors, before the policy was issued, and the answers were then written in by their secretary, in the presence of said director, before the application was signed by the assured, is inadmissible. *Jenkins v. Quincy Mut. Fire Ins. Co.* 7 Gray, Mass. 370. 1856.

§ 18. Parol evidence not admissible to vary the terms of a written contract, or to show what risks were intended to be covered and protected by the policy. *Honnick v. Phoenix Ins. Co.* 22 Mo. 82. 1855.

§ 19. Parol evidence of an agreement between a mortgagee and a mortgagor, that the former should keep the premises insured, and the latter should pay the premiums and have the benefit of the insurance, is not at all in conflict with the rule of law, that parol evidence cannot be received to contradict, vary, or explain a written contract. The evidence of such an agreement is material, as the effect of it is to entitle the mortgagor to have the avails of the policy, in case of loss, applied upon his debt, and precludes the insurers, on paying the loss, from having recourse to the securities, by way of subrogation. *Kernochan v. New York Bowery Ins. Co.* 17 N. Y. 428. 1858.

§ 20. Parol testimony is admissible to explain a latent ambiguity, in regard to the merchandise intended by the parties to be embraced in the policies. *Stone v. Elliot Fire Ins. Co.* 45 Me. 175. 1858.

§ 21. Where evidence had been permitted to show that an agent, authorized to receive applications for insurance, had often passed by after certain alterations increasing the risk were made, and might have seen them from the street; *Held*, that, it not appearing that such agent had any power to approve of an alteration, or increase of risk,

or that it was any part of his duty to inquire in regard to changes, or to notify the company, his seeing or not seeing the alterations complained of, was a fact wholly immaterial and irrelevant, and ought not, therefore, to have been admitted. *Robinson v. Mercer County Mut. Fire Ins. Co.* 3 Dutch. N. J. 134. 1858.

§ 22. Under policy containing precisely the same provisions in respect to camphene as in 17 N. Y. 194; (see Written Portion of Policy, § 6,) *Held*, that evidence of a verbal agreement at time of issuing policy, that the insured might use camphene as a lighting material, and that a portion of the premium paid was for that privilege, (there being no written evidence to that effect,) was inadmissible. *Lamotte v. Hudson River Fire Ins. Co.* 17 N. Y. 199. 1858.

§ 23. A. gave his note to an insurance company, and the company transferred it to B., in payment of a claim due to B. The note was endorsed by the president of the company. In a suit on such note, between A. and B., in another State, where the records of the company could not be produced; *Held*, that parol evidence was admissible to prove that the president was authorized to act as such, at the time of the transfer of the note. *Cabot v. Given*, 45 Me. 144. 1858.

§ 24. An insurance company transferred a promissory note of A. to B., in payment of a claim due to B. In a suit between A. and B. on such note; *Held*, that although there was no specific authority in the by-laws of the company, given to the president to endorse notes, yet that such authority was implied by virtue of his being the *ex-officio* treasurer, with power to receive and collect moneys, adjust and pay losses, &c., and that a transfer of a note by him was valid, and sufficient to pass the title. *Cabot v. Given*, 45 Me. 144. 1858. See *McIntire v. Preston*, 5 Gilm. Ill. 48. 1848.

§ 25. In a policy on "stock of goods," where there

was a false representation in the application as to the building containing them; and the lower court permitted parol evidence to show that the agent of the company had filled up the application, and knew the true situation and occupancy of the same; *Held*, that the evidence showed good faith on the part of the assured, and was not calculated in any manner to prejudice the insurers in their rights; and its admission, therefore, was not such an error as should reverse the judgment. Where instructions have been given, which, though erroneous, could not have misled the jury to the injury of the insurer, the court will not on that account disturb the judgment of the court below. *Howard Fire & Marine Ins. Co. v. Cormick*, 24 Ill. 455. 1860.

§ 26. Where verbal statements had been made to the insurer in respect to the subject of insurance, and a written application was subsequently drawn up and signed by the assured; *Held*, that the company was not bound by any communication made before the insurance was effected, and not connected with the application therefor. *Boggs v. America Ins. Co.* 30 Mo. 63. 1860.

§ 27. A policy was issued on a stock of tinner's tools, iron ware, fixtures, &c., contained in the westerly end of a brick building situate on the corner of Milton Avenue and Elm Street. The policy was subsequently renewed in 1855, and again in 1856. Previous to the last renewal, a bakery, enumerated among the specially hazardous risks, was started in adjoining tenement of the same building. The policy prohibited an appropriation of the premises for such a purpose, and also provided that if, at time of renewal, the risk had been increased, and the assured failed to give information thereof, in writing, such policy and renewal should be void. At the time of last renewal assured made known the fact of the existence of this bakery to the secretary of the company, but it was not endorsed on the policy, or otherwise communicated in writing; *Held*, that the company, by renewing the policy, was bound to accept the risk.

waived a strict compliance with the condition requiring such communication to be in writing, and that in any event the company were estopped from setting up the increased risk in bar to the action. *Liddle v. Market Fire Ins. Co.* 4 Bosw. N. Y. 179. 1859.

§ 28. An insurance policy purported to insure S. upon certain property described as "his," the amount, in case of loss, payable to W. In an action of assumpsit on the policy, brought by W. against the company; *Held*, that parol evidence was not admissible to show that W. was the real party to the contract; that the defendants had agreed to insure a mortgage interest held by him, and undertook to do so by making out the policy in the name of S. the mortgagor. *Woodbury Savings Bank v. Charter Oak Fire & Marine Ins. Co.* 29 Conn. 374. 1860.

§ 29. In the application and policy, assured described the property as "his," when in fact, by virtue of a parol agreement, he was but the equitable owner in possession, the legal title being in another, and part of the purchase money remaining unpaid. The defendants claimed that the assured's denomination of the property as "his," was a misrepresentation which rendered the insurance void, and to meet that claim, assured offered evidence to show, that he made known to the agent taking the application, the true state of the title, and that agent then filled up the application in his own language and he (the assured) signed it; *Held*, that the evidence was admissible under the circumstances to estop the insurers from taking advantage of their own wrong, and was also proper, as conducing to prove an understanding and agreement between the parties to consider and treat the property as belonging to assured. *Hough v. City Fire Ins. Co.* 29 Conn. 10. 1860.

§ 30. Parol testimony is admissible to establish the identity and extent of property covered by a policy of insurance. *Roots v. Cincinnati Ins. Co.* 1 Disn. Ohio, 138. 1856.

§ 31. A policy of insurance to "K. and others," on stock in process of manufacture, may be shown by parol evidence to have been issued to a corporation in which K. was a stockholder, having no other title in the property; and upon proof of that fact an action may be maintained thereon by the corporation in their own name; and evidence that before the policy was issued K. owned the property and had made an agreement to sell it to them, under which they had entered into possession, and carried on alone the business of manufacturing, and that the application for insurance was made by one of their directors, who procured the insertion of a provision therein, making it payable to the corporation in case of loss, tends to prove that fact. *Shawmut Sugar Refining Co. v. Hampden Mut. Ins. Co.* 12 Gray, Mass. 540. 1859.

§ 32. Parol evidence cannot be received to control, explain or modify a warranty in a policy of insurance. *Ripley v. Aetna Ins. Co.* 30 N. Y. 136. 1864.

§ 33. Verbal statements, made by an agent who effects insurance for the owner of the property, in respect to the future occupation of the building, are not admissible in evidence, in an action upon the policy. If there is any warranty as to the future use or occupation of the property insured, it must be contained in the policy, or be reduced to writing in proper form, before it can be admitted to affect the construction or obligation of the policy. *Mayor &c. of New York v. Brooklyn Ins. Co.* 41 Barb. N. Y. 231. 1864.

§ 34. A statement in a policy which is in terms a warranty, cannot be shown by parol evidence to have been inserted by mistake. *Cooper v. Farmers' Mut. Fire Ins. Co.* 50 Penn. St. 299. 1865.

§ 35. In an action upon a policy of insurance in which it was set up as a defense that the insurable interest of

assignment in writing, after the issuance of the policy, and before the loss; *Held*, that parol evidence was admissible to show that the assignment, though absolute on its face, was, in fact, given as collateral security. *Ayers v. Home Ins. Co.* 21 Iowa, 185. 1866.

See Application, § 36. Construction, 19. Description of Property Insured, 14. Encumbrance, 32. Estoppel, 7. Evidence, 38. Interest in Policy, 8, 30, 48. Other Insurance, 30, 35, 38, 39. Payment of Premium, 5. Premium notes, 20. Rebuild, Repair or Replace, 6. Re-insurance, 8. Subrogation, 12. Title, 28, 49. Two-thirds or Three-fourths Clause, 1, 2. What Property is Covered by Policy, 26.

PAYMENT OF LOSS.

§ 1. Where a stock company stipulated that "payment of losses shall be made within sixty days after the loss shall have been ascertained and proved, without any deduction whatever;" and the insured had paid a cash premium for the insurance; *Held*, that he did not thereby become a member or stockholder of the company, within the meaning of § 16 of the "Act to provide for the incorporation of insurance companies," passed April, 1849, in New York; and that, therefore, it did not lie with the defendants to say that payment was to be made at another time than that mentioned in the contract, or that they might withhold payment for the additional two months mentioned in § 16. *Howard v. Franklin Marine & Fire Ins. Co.* 9 How. N. Y. 45. 1853.

§ 2. An act of the legislature, providing for the incorporation of insurance companies, authorized "suits to be brought against such companies by any member for losses, if payment is withheld more than two months after such losses shall have become due." Under this provision, it was *Held*, where amount due upon a policy was ascertained and settled by a resolution of the company on 13th January,

and the money declared to be payable sixty days thereafter, that by such settlement the money became then due and payable in sixty days thereafter; and that a suit commenced after that time was well brought. *Utica Ins. Co. v. American Mut. Ins. Co.* 16 Barb., N. Y. 171. 1853. *Allen v. Hudson River Mut. Ins. Co.* 19 Barb. N. Y. 442. 1854.

§ 3. Where policy provides that "payment will be made in sixty days after loss, proof and adjustment thereof;" an action will lie within the sixty days, if the insurers refuse to adjust the loss. *Phillips v. Protection Ins. Co.* 14 Mo. 220. 1851. *Indiana Mut. Fire Ins. Co. v. Rutledge*, 7 Ind. 25. 1855.

§ 4. On a policy providing that the loss shall be paid within sixty days after notice and proof thereof, according to the conditions annexed to the policy, which require such proof to include a statement of the interest of the assured in the property, the assured, if he omits to insert such a statement in his proof of loss, cannot maintain an action unless the omission is waived by the officers of the company. *Shawmut Sugar Refining Co. v. People's Mut. Fire Ins. Co.* 12 Gray, Mass. 535. 1859.

§ 5. An insurance company will not be protected in paying a loss to a mortgagee after such mortgagee has, subsequent to the loss, assigned his mortgage, and the company have received notice of the assignment. *Haskell v. Monmouth Fire Ins. Co.* 52 Me. 128. 1859.

§ 6. An order upon the secretary of an insurance company, payable at sight, drawn by its duly authorized agent, and given and received in full satisfaction for a loss under a policy, will operate as a payment thereof, before its presentation to the secretary. *Spooner v. Rowland*, 4 Allen, Mass. 485. 1862.

§ 7. A clause in a condition in a policy, giving the

insurers thirty days within which they shall have the option to rebuild, is not repugnant to another part of such condition, in which it is stipulated that the company will pay the loss "within sixty days." *Beals v. Home Ins. Co.* 36 Barb. N. Y. 614. 1862.

§ 8. The money due on a policy of insurance for a loss by fire occurring between the date of a contract for a sale of the property insured and the time fixed for the delivery of the deed, as between the company and the vendor, by whom it was insured, belongs to the latter. *Reed v. Lukens*, 44 Penn. St. 200. 1863.

§ 9. It seems that where objections are made by the insurers to the preliminary proofs of loss, the sixty days at the end of which the loss by stipulation of the policy is payable are not to be deemed to commence to run until after a reasonable time for the insured to examine the objections, and if amendments were required, to make and serve them. *Mayor &c. of New York v. Hamilton Fire Ins. Co.* 10 Bosw. N. Y. 537. 1863.

§ 10. Where property is insured against fire in several companies, and each policy contains a proviso that in case of a loss the assured shall not be entitled to receive of the company issuing such policy any greater proportion of the loss than the amount insured by such policy bears to the whole amount insured upon the property; the liability of any one of the companies to pay the assured its ratable share of the loss is not affected by the fact that some of the other companies have paid more than their share, so that the amount already received by the assured is equal to his whole loss. *Fitzsimmons v. City Fire Ins. Co.* 18 Wis. 234. 1864.

See Assignment, § 30, 32. Contribution, 12. Estoppel, 8. Preliminary Proofs, 40. Waiver, 15.

PAYMENT OF LOSS TO TRUSTEE.

§ 1. Policy to L., trustee of F., on a ship, which was lost and F. with it. The widow of F. notified the insurers that L. was mere trustee, and to pay the insurance money to her; but L., pretending that F. was indebted to him, persuaded them to settle with him, and thereupon the widow brought a bill to recover of the insurers. She was appointed administratrix after the suit was commenced. The objection, that she was not administratrix at the time of filing the bill, was overruled; and the insurers decreed to pay the money to the widow, notwithstanding the settlement with L. *Fell v. Lutwidge*, Barnardiston, Ch. 319. 1740.

§ 2. A ship-builder employed a broker to effect an insurance at Lloyds upon a ship, and after loss, gave the ship's papers to the broker, and also the policy, which was in his own name, to adjust the loss. The broker made an adjustment, according to an usage generally known to merchants and ship-owners, but not proved to be known to assured, by setting off amounts due from him to the company on other insurances, against the amount of loss belonging to assured; *Held*, that, although the plaintiff was estopped from denying that the broker had authority to receive the amount due from the underwriters in money, he was not bound by the usage, and, consequently, that he was entitled to recover the amount of the policy against the underwriter, notwithstanding such settlement. *Sweeting v. Pearce*, 7 Com. B. N. S. 449. 1859. See also, *Scott v. Irving*, 1 Barn. & Adol. 605. 1830.

PAYMENT OF PREMIUM.

§ 1. Where the applicant is notified that the payment of the premium is a condition precedent to the taking effect of the insurance, no contract subsists while it remains unpaid, although the policy may have been made out, but not delivered. *Flint v. Ohio Ins. Co.* 8 Ohio, 501. 1838.

§ 2. A check on the bank, payable to the order of the agent and accepted by him in payment of the premium, is in compliance with condition requiring payment before policy can take effect. The mode of payment not being prescribed by the company, the agent is at liberty to exercise a discretion in the matter, and may prescribe the mode of payment. *Tayloe v. Merchants' Fire Ins. Co.* 9 How. U. S. 390. 1849.

§ 3. A policy issued and delivered to the assured, in which the premium is acknowledged as actually received, will bind the insurer, though the premium was not in fact paid till after the fire. *New York Central Ins. Co. v. National Protection Ins. Co.* 20 Barb. N. Y. 468. 1854.

§ 4. Policy provided that "no insurance should be considered binding until the actual payment of the premium." Assured proposed drawing a check upon delivery of the policy, but agent of insurer requested him to let it lie, and that he (agent) would call for it when he wanted it. The premium was not paid until after the loss. *Held*, that the agent of the insurer had waived the actual payment of premium, and that he had authority to do so. *New York Central Ins. Co. v. National Protection Ins. Co.* 20 Barb. N. Y. 468. 1854.

§ 5. Parol evidence to show a waiver of the condition requiring payment of premium before the policy should attach, is no more a violation of the rule prohibiting parol evidence to vary or contradict a written contract, than would have been evidence by parol of the actual performance of the condition. *Goit v. National Protection Ins. Co.* 25 Barb. N. Y. 189. 1855.

§ 6. An insurance company, through its president, agreed with the treasurer of the 1st Baptist Church in Brooklyn, to continue renewing its policy and calling for the premium when desired, until one party or the other should give notice of a desire to cancel such agreement. In pursuance of such arrangement the renewals were regularly made out for several years, and, within from thirty to sixty or ninety days afterwards, the president would take the renewal receipt to the treasurer and collect the premium. On the 21st of July, 1847, the last renewal had been taken to the treasurer, and in September, 1848, following, the property was destroyed, but the renewal receipt had not then been delivered to the treasurer, nor had the premium been paid. The policy stipulated that "no insurance should be considered valid or binding, until the actual payment of the premium." *Held*, that there had been a waiver of payment of premium on the part of the company by the parol agreement between president and assured; and the company were liable for the loss. *Baptist Church of Brooklyn v. Brooklyn Fire Ins. Co.* 18 Barb. N. Y. 69. 1854. See same case, 19 N. Y. 305. 1859. Parol Contract, § 6.

§ 7. Where the policy on the face of it acknowledges the receipt of the premium, parol evidence cannot be introduced to contradict it, and insurers will be estopped by their receipt from alleging that the policy was void because the acknowledgment was untrue. *Goit v. National Protection Ins. Co.* 25 Barb. N. Y. 189. 1855.

§ 8. Where policy stipulated that "no insurance

PAYMENT OF PREMIUM.

should be binding until actual payment of the premium," and the agent told the assured to let the premium alone and he would call for it when ready to make his report to the company, and in the meantime the property was destroyed by fire, and the premium paid to the agent after the fire; *Held*, that there had been a waiver of the condition requiring payment of premium, and the insurers were liable. *Goit v. National Protection Ins. Co.* 25 Barb. N. Y. 189. 1855.

§ 9. If the premium is tendered to the agent when application for insurance is made, and he does not receive it, but says he will consider it as paid, and authorizes the applicant to keep the money until the policy arrives, the contract will be as binding upon the company as if the money was actually paid over to the agent. *Hallock v. Commercial Ins. Co.* 2 Dutch. N. J. 268. 1856.

§ 10. An agreement made in good faith between an insurance agent, having authority to receive an insurance premium, and the insured, that the agent shall become personally responsible to his principals for the amount of such premium and the insured his personal debtor therefor, constitutes a payment of the premium as between the insured and the insurance company. *Bouton v. American Mut. Life Ins. Co.* 25 Conn. 542. 1857. *Sheldon v. Connecticut Mut. Life Ins. Co.* 25 Conn. 207. 1856.

§ 11. In an action brought on a policy, the defense was, that the consideration of the policy was a cash premium, and that, under the general act of the New York Legislature of April 10th, 1849, the defendant, being a mutual company, had only authority to issue policies for the consideration of premium notes. The charter under said act provided that the premium might be cash or notes as the parties should agree. *Held*, that this provision of the charter, not being in conflict with the general act, was valid; and that one might become a member of a mutual insurance company by paying a cash premium as

well as by giving a premium note. *Union Ins. Co. v. Hoge*, 21 How. U. S. 35. 1858.

§ 12. One of the by-laws governing the contract provided that, before the policy shall be delivered, the assured shall pay such premium and give such deposit note as the president and directors shall determine. *Held*, that no contract of insurance could be completed, nor could the policy take effect, until such premium was paid and such note was given; and that neither the president, secretary, nor board of directors of a mutual company had authority to waive a compliance with the by-law. *Brewer v. Chelsea Mut. Fire Ins. Co.* 13 Gray, Mass. 203. 1859.

§ 13. It seems that the officers of a mutual insurance company have no power to waive a stipulation in a policy which has been executed and delivered, that no insurance shall take effect until the cash premium has been actually paid at the office of the company. *Mulrey v. Shawmut Mut. Fire Ins. Co.* 4 Allen, Mass. 116. 1862.

§ 14. Where it was stipulated in a policy that it should not be valid until the premium had been actually paid at the office of the company; *Held*, that such stipulation was not complied with or waived by a payment of the premium to an insurance agent through whom the application was made, and the policy delivered, the policy also containing an express stipulation that every insurance agent, broker or other person forwarding applications or receiving premiums, should be deemed the agent of the applicant, and not of the company; although the company were in the habit of settling a monthly account with such agent, and he, after the loss, tendered the premium to the company. *Mulrey v. Shawmut Mut. Fire Ins. Co.* 4 Allen, Mass. 116. 1862.

§ 15. A policy of insurance executed and delivered by a mutual insurance company is invalid until the cash premium has been actually paid at the office of the com-

pany, if it contains an express stipulation to that effect. *Mulrey v. Shawmut Mut. Fire Ins. Co.* 4 Allen, Mass. 116. 1862.

§ 16. If the by-laws of a mutual insurance company provide that "each person, before the policy shall be binding on the company, shall pay to the treasurer or agent such premium and make such deposit as the directors shall determine," the company is not rendered liable on a policy which is executed but not delivered, and for which no premium has been paid, by an oral promise of their treasurer to the applicant for insurance that, if anything should happen, he would see the premium paid, or that he would take it upon himself to keep the policy good. *Buffum v. Fayette Mut. Fire Ins. Co.* 3 Allen, Mass. 360. 1862.

§ 17. An insurance company may waive a condition in its usual form of policy, that in order that the policy should be binding the premium must be actually paid, as well as any other condition in the contract intended for its benefit; and if the insured is allowed to act upon the confidence of such waiver, the company is estopped to deny the fulfillment of the condition. *Heaton v. Manhattan Fire Ins. Co.* 7 R. I. 502. 1863.

§ 18. An acknowledgment in a policy of the receipt of the premium is not conclusive upon the insurer. He may still show that it has not been paid. *Sheldon v. Atlantic Fire and Marine Ins. Co.* 26 N. Y. 117. 1863.

§ 19. Where under a condition requiring payment of assessments within thirty days from demand, and avoiding the policy until paid, a balance remained unpaid beyond that time and on the day of the fire, but was paid the same day to the agent of the company, and by him reported to the company, without objection on the part of either of them, such a receipt is a waiver of the forfeiture. *Lycoming County Mut. Ins. Co. v. Schollenberger*, 44 Penn. St. 259. 1863.

§ 20. An agreement to give credit for the premium, renders the policy binding without actual payment. *Baptist Church v. Brooklyn Fire Ins. Co.* 28 N. Y. 153. 1863.

§ 21. The rule that an act done at one time may take effect as of a prior time by relation back to the principal contract, is applicable to contracts of insurance; the agreement to insure being the principal act, the payment of the premium and the formal execution of the policy may be concurrent therewith or subsequent thereto. *City of Davenport v. Peoria Marine & Fire Ins. Co.* 17 Iowa, 276. 1864.

§ 22. Where an insurance agent is authorized under the previous dealings between him and the insured to charge the premium on a renewal, in account, or to resort to an implied agreement for its payment, he may make a renewal on the implied promise to pay, as well as upon actual payment of the premium; notwithstanding a provision in the policy that no insurance shall be considered binding until the actual payment of the premium. *Post v. Aetna Ins. Co.* 43 Barb. N. Y. 351. 1864.

§ 23. Where an insurance company, by its charter, can issue policies either on the mutual or cash plan, it may receive for such policies promissory notes on time. *Farmers' Bank v. Maxwell*, 32 N. Y. 579. 1865.

§ 24. The delivery of a policy by a general agent of the company without requiring payment of the premium raises a presumption that a short credit is intended to be given, and the policy will be binding. *Boehen v. Williamsburgh City Ins. Co.* 35 N. Y. 131. 1866.

See Agent, § 42, 64. Consummation of Contract, 17, 25. Parol Contract, 10. Premium Notes, 17. Waiver, 25.

PLACE OF MAKING CONTRACT.

§. In an action on a premium note, taken in Ohio, for a policy made by a New York company in New York, through application forwarded to them by a surveyor; it was *Held*, that the contract for insurance was made in New York, and did not violate the Ohio law, prohibiting foreign insurance companies to insure in Ohio without license. *Hyde v. Goodenow*, 3 Comst. N. Y. 266. 1850.

§ 2. By the terms of the policy, applicants for insurance were required to deposit the application and premium note with the secretary of the company, when, if approved, the policy to be dated as of the day of approval, unless the applicant directed that it should be dated as of some future day. One P. was agent of the company for the purpose of receiving and forwarding application, and received, in Canada, the application of a party residing there, and forwarded it to the company at Le Roy, its place of business in New York. Upon receipt of such application, together with the premium and premium note, the company executed a policy at Le Roy, and returned it to the agent for delivery to applicant. *Held*, that the contract was consummated by the final assent on the part of the company, and upon that event, and not upon its delivery to the assured, became operative; and that the validity, therefore, of the contract must be determined by the law of New York, as it was there made. *Western v. Genesee Mut. Ins. Co.* 2 Kern. N. Y. 258 1855.

§ 3. Where policy was issued by a company in Waterford, N. Y., and policy purported to be dated there

and signed by the president and secretary; but the negotiation was had by an agent of the company in Massachusetts, and by the terms of the policy it was not to be valid unless countersigned by their agent at Worcester, and it was so countersigned and delivered by him; *Held*, that it took effect as a contract from the countersignature and delivery of the policy and was to be interpreted according to the laws and usages of Massachusetts, in the same manner with any other Massachusetts policy of insurance against fire. *Daniels v. Hudson River Fire Ins. Co.* 12 Cush. Mass. 416. 1853.

§ 4. A company located in New York, issued a policy in Pennsylvania, through an agent only authorized to receive applications, to forward to the company, but the policy was made out at the office of the company in New York; in an action on the premium note; *Held*, that the contract was not void, as being in violation of the laws of Pennsylvania; and, 2d, that the company not having any agent in Pennsylvania, the proviso of the statute of that State, requiring every agent of a foreign insurance company to file a duplicate of the statement, &c., had no application. *Huntley v. Merrill*, 32 Barb. N. Y. 626. 1860.

PLEADING AND PRACTICE.

§ 1. Under statute of Virginia, giving summary remedies against delinquent subscribers and members, a judgment will not be granted on motion, for the premium, against the purchaser, from one who had declared for insurance, but had not in fact been insured, or received a policy, because of non-payment of premium. *Greenhow v. Bacton*, 1 Munf. Va. 590. 1810.

§ 2. F., W. & M., being trustees and directors of a fire insurance company, executed a policy to indemnify A. and others from loss by fire, whereby they "ordered, directed and appointed the directors" for the time being to pay the loss which A. and others should sustain in the event of a fire happening; and the policy, among other clauses, went on to recite certain provisions containing the words, "conditions and agreements," and a loss having happened; *Held*, that the policy was not an instrument or agreement upon which covenant would lie, and consequently, that neither the executing parties, nor the directors for the time being, were liable at law. *Alchoren v. Saville*, 6 J. B. Moore, 202 note, (17 E. C. L. 469.) 1812.

§ 3. By a policy under seal, three of the directors of a fire company admitted the plaintiff to be a member of that society, upon terms and conditions prescribed by the deed of settlement of the association; and he subscribed a certain sum as the consideration money for one year's insurance, and it was declared that he should be entitled to a remuneration out of the society's funds, in case of loss by fire happening to any property therein specified, not exceeding the sum set opposite each article respectively; and it was further stipulated that neither of the directors who signed the policy, nor the plaintiff or the holder of it, should, as members of the society, be subject or liable to any demand for loss, except under the articles establishing the society, and as was provided by the same. The plaintiff having sustained a loss by fire, declaration that the funds of the association were sufficient to satisfy the amount of such loss, and the jury found a verdict for him; *Held*, that such declaration was sufficient, and that the defendants were liable by the terms of the policy; and the court therefore refused to arrest the judgment. *Andrews v. Ellison*, 6 J. B. Moore, 199. (17 E. C. L. 468.) 1821.

§ 4. Where there are mixed questions of law and fact presented by long accounts, the practice in New York

is to hear the cause until the questions of law are disposed of, and then send the accounts to referees for adjustment. *Samble v. Mechanics' Fire Ins. Co.* 1 Hall N. Y. 560. 1829.

§ 5. The charter of company provided, that "in case any person insured by the company shall sell, and convey, or assign, the 'subject insured,' it shall be lawful for such assured to assign and deliver to the purchaser such policy, and such assignee shall have all the benefit of such policy, and may bring a suit in his own name; provided, before any loss happens, notice shall be given of the assignment," &c. In an action on such policy, by the assignee; *Held*, that an averment, that the plaintiff "was interested in the buildings," and that original assured had transferred all his right and interest "in and to the policy of insurance," was not sufficient—that it was not "any interest" in the subject insured which authorized the assignment of the policy and the right of action, but the "whole interest insured," and that the plaintiff having failed in his declaration to show, that he was either the purchaser or assignee of the "subject insured," could not maintain the action. *Granger v. Howard Ins. Co.* 5 Wend. N. Y. 200. 1830.

§ 6. Separate actions brought against several underwriters on same policy. Defendants moved to consolidate the cases, so that one trial should dispose of the whole. The court refused to grant the motion, against the consent of plaintiff. *Doyle v. Anderson*, 1 Adolph. & Ellis, 635. (28 E. C. L. 300.) 1834. Consolidation ordered in a similar case. *Hollingsworth v. Broderick*, 4 Adolph. & Ellis, 646. (31 E. C. L. 287.) 1836.

§ 7. Plaintiff alleged that "his" store was consumed by fire; *Held*, that though this was not a technical averment that he was the owner, yet it was sufficient after verdict; and so the omission to allege or set forth the value of the store and goods at the time, though defective

upon special demurrer, was sufficient after verdict. *Lane v. Maine Mut. Fire Ins. Co.* 12 Me. 44. 1835.

§ 8. Under the averments, that the goods, to the amount mentioned in the policy of insurance, were not lost; and that the insurer suspected, and had reason to suspect, that the pretended loss was altogether fraudulent; evidence will be received to prove that the plaintiff had not the goods when the loss occurred, and that it was fraudulent. *Brugnot v. Louisiana State Marine & Fire Ins. Co.* 12 La. 326. 1838.

§ 9. The record showed that the plaintiff, a corporation, appeared by attorney: *Held*, that the appearance was sufficient. If a statute of a private nature contain a clause declaring it a public act, it will be noticed by the courts as a public act, and need not be pleaded. *Brookville Ins. Co. v. Records*, 5 Blackf. Ind. 170. 1839.

§ 10. Suit was instituted for the whole amount due on a policy of insurance, which the company had paid and settled, but done with a view to try a feigned case, to see if the company were not entitled to retain nine hundred dollars for value of brick taken from the old building to reconstruct the new houses. *Held*, that the court could not entertain or act on a feigned case or suit, even with the consent of the parties. *Kohn v. Louisiana Ins. Co.* 15 La. 86. 1840.

§ 11. Defects in declaration, such as may be taken advantage of by special demurrer, are cured by a trial and verdict on the merits. *Ins. Co. v. Seitz*, 4 Watts & Serg. Pa. 273. 1842.

§ 12. Plea, under condition that all fraud and false swearing shall cause a forfeiture, &c., setting up fraud, &c.; *Held*, bad, 1st, because it did not allege that the fraud was committed by plaintiff or any party in interest; 2d, because it did not allege that the fraud was committed

in the rendition of preliminary proofs. *Ferris v. North American Fire Ins. Co.* 1 Hill, N. Y. 71. 1841.

§ 13. In an action on a policy of insurance against fire, for loss or damage to furniture and glassware, where the defence charged fraud on the part of the plaintiff, and the judge referred the cause, to have the amount of loss ascertained; *Held*, that in a case involving a charge of fraud, the assured was entitled to a trial before a court and jury; and the order for reference was vacated. *Levi v. Brooklyn Fire Ins. Co.* 25 Wend. N. Y. 687. 1841.

§ 14. In an action on a policy of insurance, an allegation in the petition, that the defendants were legally put in default, will be sufficient, without expressly alleging a compliance in detail with the provisions of the policy, where such compliance is proved on the trial. *Mason v. Louisiana State Marine & Fire Ins. Co.* 1 Rob. La. 192. 1841.

§ 15. In an action on a fire policy the defenders plead that the insurance was fraudulently effected and was null. On motion, they were required to take a special issue as to the fraud, or withdraw the plea. *Campbell v. Aberdeen Fire & Life Assurance Co.* 3 Cases in the Court of Sessions, N. S. 1010. 1841.

§ 16. A plea, embodying the tenth condition of the policy, which stated that after the fire, to wit: on the 26th of August, 1845, the plaintiff was required by the defendants to deliver an account in writing under his hand, verified by his oath and by his books of account, &c., and permit extracts, &c., to be taken respecting the loss, &c., and the plaintiff refused, is not double, as they all go to establish one point—the non-performance by the plaintiff of that part of the tenth condition. A traverse in a plea that the plaintiff was not interested in the goods insured to the whole amount of their value is too large; for if he was interested in any part, he is entitled to recover *pro tanto*.

To a declaration, which averred performance by the plaintiff of all the acts required by the tenth condition to be performed by him, a plea traversing the performance of all these acts, is good according to the rules of pleading at common law. A plea which first traverses an allegation in the declaration of the delivering of loss, according to the tenth condition, and secondly, sets up fraud, is unobjectionable. The refusal to deliver an account in such case is indicative of fraud, and is consistent with the general charge of fraud subsequently made. *Ketchum v. Protection Ins. Co.* 1 Allen, N. B. 136. 1848.

§ 17. Plea, that the insured had misrepresented his title; for that he derived title by devise, and that his devisor, at time of receiving his deed some twenty years before, had the same day executed to his grantor a writing showing the conveyance to be a mortgage, wherefor said grantor had a right to redeem, and the insured had not so represented, although the charter of the company required a true statement of the title, encumbrance, &c.; *Held*, bad, because the contents of said writing were not stated, nor the facts given, from which the court might draw the inference, whether or not the insured had only a mortgage title at the date of the policy. *Kentucky & Louisville Mut. Ins. Co. v. Southard*, 8 B. Monroe, Ky. 634. 1848.

§ 18. Plea, that a room in a dwelling-house had been altered, and used as a kitchen, when the application and survey stated that the kitchen was in a separate building, fifteen feet off, whereby the risk was increased; *Held*, bad, for reason stated below in § 19, and also because of uncertainty in not showing whether the room was used as a kitchen at the date of the policy, or not till afterwards. *Kentucky & Louisville Mut. Ins. Co. v. Southard*, 8 B. Monroe, Ky. 634. 1848.

§ 19. The plea of a misrepresentation must show, not only that the fact misrepresented increased the hazard of loss, but that, according to the rules or modes of business

of the insurers, it would have enhanced the premium, or prevented the insurance. *Kentucky & Louisville Mut. Ins. Co. v. Southard*, 8 B. Monroe Ky. 634. 1848.

§ 20. Plea, that a fire-place, represented to be secure, was defective, is bad, because not pointing out the defect. *Kentucky & Louisville Mut. Ins. Co. v. Southard*, 8 B. Monroe, Ky. 634. 1848.

§ 21. By the tenth condition attached to the policy, it was stipulated that in the event of a loss, the assured should forthwith give notice of the same to the company, and as soon thereafter as possible deliver to the insurers a particular account in writing, signed with his own hand, and verified by oath or affirmation, &c. The declaration stated the fire to have happened on the 29th of July, 1845, and that the compliance with this condition, in respect of notice of the fire, took place on the same day; as to the delivery of a particular account in writing, on the 20th of August, 1845; and in respect to the declaration on oath, the 27th of March, 1846; held, sufficient, the respective times having been laid under a *videlicet*; the performance of these acts, whether in due season or not, being matter of evidence; *Held*, also, that the proofs required by the tenth condition might be waived, and being a question of fact, the mode of waiver need not be stated. *Ketchum v. Protection Ins. Co.* 1 Allen, N. B. 136. 1848.

§ 22. A plea, alleging false swearing in a statement, annexed to the declaration of loss made by the assured, held bad, for not averring that any such statement was annexed, and for not showing when and before whom the oath was made, or in what particular the statement was false. *Ketchum v. Protection Ins. Co.* 1 Allen, N. B. 136. 1848.

§ 23. Unless there was a prayer for specific instructions, it is not error in the court to omit to draw the attention of the jury to the distinction between goods covered

by the policy, and those not included therein, which have been destroyed. *Klein v. Franklin Ins. Co.* 13 Penn. St. 247. 1850.

§ 24. An averment by the plaintiff, that camphene, &c., was not used as a light in the store mentioned in the policy, or, if used, that premium for such use was endorsed in writing on the policy, is not necessary, either under the old rules of pleading, or the new code. *Hunt v. Hudson River Fire Ins. Co.* 2 Duer, N. Y. 481. 1853.

§ 25. The policy required notice forthwith in case of loss. The complaint averred, "that, as soon as possible after said fire, that is to say, on the 24th May, (the fire having occurred on 20th May,) the plaintiffs gave notice of the same to the defendants." *Held*, that under this averment the plaintiffs might show, that notice was given on the morning after the fire. *Hovey v. American Mut. Ins. Co.* 2 Duer, N. Y. 554. 1853.

§ 26. A plea merely alleging that the property was insured in another office, is bad; the particulars of the alleged insurance should be stated. *Ramsay Woolen Cloth Manf. Co. v. Mutual Fire Ins. Co.* 11 Upper Canada, Q. B. 516. 1853.

§ 27. The officers of insurance companies in St. Louis agreed not to insure for the plaintiff, in consequence of which agreement, assured sold his property and was thrown out of business. *Held*, that an action for damages against such officers could not be maintained. *Hunt v. Simonds*, 19 Mo. 583. 1854.

§ 28. In an action on a policy of insurance, no defense can be introduced, unless it is set up in the answer. *New York Central Ins. Co. v. National Protection Ins. Co.* 20 Barb. N. Y. 468. 1854.

§ 29. A misrepresentation by the assured, not speci-

fied in the defendant's answer, cannot be relied on to defeat an action on the policy, although such misrepresentation is first disclosed by the assured's evidence. *Haskins v. Hamilton Mut. Ins. Co.* 5 Gray, Mass. 432. 1855.

§ 30. A defective statement of a good cause, can not be taken advantage of by a motion in arrest of judgment, after a verdict. *New Hampshire Mut. Fire Ins. Co. v. Walker*, 10 Fost. N. H. 324. 1855.

§ 31. Where the declaration set out promise, in consideration of acceptance of assignment of policy by company; and the promise proved, recited assignment of policy to be the consideration; *Held*, that there was a variance between the proof and the declaration. General count on account for assessments, sustained. *New Hampshire Mut. Ins. Co. v. Hunt*, 10 Fost. N. H. 219. 1855.

§ 32. A demurrer to the whole complaint, is bad, if one of the plaintiffs might have judgment, separately. *Peabody v. Washington County Mut. Ins. Co.* 20 Barb. N. Y. 339. 1855.

§ 33. The declaration averred that "the defendants made a policy and then and there promised the plaintiffs to insure," &c. *Held*, that the pleading set forth a contract of insurance, and not merely an agreement for a contract. *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 20. 1855.

§ 34. An allegation, that there was no insurance not notified to the company, at the time of the fire nor after the making of the policy, is equivalent to an averment that there was no such insurance at the time the policy was effected. *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 20. 1855.

§ 35. In an action of covenant on a policy of insurance, the conditions of which provided that losses should be paid in sixty days after proof of them, and that no suit

should be maintained unless commenced within twelve months next after the "cause of action accrued," a plea that the fire took place more than twelve months before the suit commenced, is bad, because it assumes that it was necessary to sue within twelve months of the loss happening, while the language of the policy is, that the suit shall be brought within twelve months next after the cause of action shall accrue. *Lampkin v. Western Assurance Co.* 13 Upper Canada, Q. B. 361. 1855.

§ 36. Plaintiff is required to set forth in his declaration only such provisions of the policy as affect his right of action. *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 20. 1855.

§ 37. Plaintiff need not anticipate and set up in his declaration objections that may be urged by defendants. *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 20. 1855.

§ 38. The by-laws of a company need not be set out *verbatim* in the declaration; allegations showing a substantial compliance therewith, are sufficient. *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 20. 1855.

§ 39. Where the reading of an instrument in evidence, is objected to, on the ground of variance, it is incumbent upon the party objecting, to specify the particular matter of variance. *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 20. 1855.

§ 40. The act of incorporation provided that, in case an assessment should not be paid within a time fixed after notice thereof should be given, suit might be brought for the whole amount of the note. This action was brought for the whole amount of the note, and the declaration set forth the assessment and notice thereof, and that defendant "has refused to pay said assessment or any part thereof, and the time limited for the payment thereof, by the by-laws, has long since elapsed; by the neglect and refusal of

said assessment, the whole amount of his said premium notes has become due and payable agreeably to the provisions of the act of incorporation of said company." Defendant objected that only the time limited by the by-laws was alleged to have elapsed, which might be less than the time given in the act of incorporation, and less, therefore, than he was entitled to; *Held*, that, though the by-laws might have granted a longer time than that given by the charter, it was not to be presumed that, in violation of law, they would prescribe a shorter time, and that the declaration was sufficient, and judgment should be rendered for the whole amount of the note. *Missouri State Mut. Fire & Marine Ins. Co. v. Spore*, 23 Mo. 26. 1856.

§ 41. It is not an error, to which an exception will lie, that the judge submits the very question in issue to the jury; although the matter of defence is sworn to by one witness, and he is not contradicted; a verdict for the plaintiff may, in such case, be against evidence, but the defendants should seek relief by motion for a new trial, and not by exceptions and appeal from judgment. So the defendants might have required suitable instructions regarding the force and effect of the evidence. *Stettiner v. Granite Ins. Co.* 5 Duer, N. Y. 594. 1856.

§ 42. To declaration, that the directors "made, agreeably to their act of incorporation and by-laws, an assessment on said note, together with other second class policy notes held by the plaintiffs," defendant answered, denying that any such assessment had been made as was set forth in the plaintiff's declaration. *Held*, that this denial distinctly put in issue the validity of the assessment, and was in substance a compliance with the Massachusetts Statute of 1852, C. 312, § 14. *People's Equitable Marine & Fire Ins. Co. v. Arthur*, 7 Gray, Mass. 267. 1856.

§ 43. In an action of covenant against an insurance company to recover an insurance, the defendants cannot show on the trial that, at the time the insurance was ef-

fect, the insured misrepresented his interest in the property, unless it is expressly pleaded that such misrepresentation was made. *Sussex County Mut. Ins. Co. v. Woodruff*, 2 Dutch. N. J. 541. 1856.

§ 44. Where the policy provided that the damages should either be ascertained and paid, or the building restored to its former condition; *Held*, that this was a mere contract of indemnity against unliquidated and unascertained damages, for which no action of debt could be maintained, whether the contract were by deed or by parol; that bringing debt on such a contract was an error in a matter of substance, not of form, and that advantage might be taken of it upon general demurrer, in arrest of judgment, or upon writ of error. *Flannagan v. Camden Mut. Ins. Co.* 1 Dutch. N. J. 506. 1856.

§ 45. Where a declaration averred the effecting of an insurance on "his" three story and attic stone building, &c., and also on "his" water wheel, and on a frame building occupied by the insured, &c.; *Held*, the averment of interest was sufficient. The statement of ownership of property was plain and concise, such as could not fail to be understood, which was all that the code of procedure in New York required. *Fowler v. New York Indemnity Ins. Co.* 23 Barb., N. Y. 143. 1857.

§ 46. A plea in bar to an action on policy, that an encumbrance had been executed on the premises insured, against the provisions of the policy sued on, should aver that the company did not assent and agree to such encumbrance; it being permissible with their consent. *Peoria Marine & Fire Ins. Co. v. Lewis*, 18 Ill. 553. 1857.

§ 47. If it is objected, that an assignment, or change of interest in the premises insured, was executed subsequent to the policy, want of consent must be averred in a plea to an action on the policy; or it will be presumed that the conditions of the policy have been complied with. *Peoria Fire & Marine Ins. Co. v. Lewis*, 18 Ill. 553. 1857.

§ 48. Where there was a variance between the policy, as executed and signed, and the policy as set forth in the pleadings; *Held*, that, as there was no allegation or proof that the defendants had been misled or prejudiced by it, it must be deemed, under the 43d section of the act of 1855 (Nixon's Digest, 641,) in New Jersey, immaterial. *Hallock v. Commercial Ins. Co.* 2 Dutch. N. J. 268. 1857.

§ 49. If the declaration allege that the premium note sued on is of a certain date, and it proves to have no date, the variance is fatal. If a day was stated, without describing the note as dated on that day, it would not be material. A variance between the declaration and proof, as to the time when the assessment was made, or as to the time when payment thereof was required to be made, is immaterial. *Atlantic Mut. Fire Ins. Co. v. Sanders*, 36 N. H. 252. 1858.

§ 50. Demurrer to declaration on premium note, set out as payable to the company or their treasurer; *Held*, that this was not a promise to two distinct parties in the alternative, but was a promise to the company to pay them; and the words, "or their treasurer," merely introduces a stipulation that a payment to the treasurer shall be considered as made to them so as to fulfil the contract. *Atlantic Mut. Fire Ins. Co. v. Young*, 38 N. H. 451. 1859.

§ 51. Reply to plea of breach of warranty, alleging that the facts constituting the breach were known to the company, without this that the policy was made upon the warranty of insured as plead. Rejoinder, re-asserting warranty. *Held*, 1st, that the only issue presented was as to the knowledge of the company, and that evidence of facts to show the breach of warranty was improper; 2d, that the issue of knowledge tendered, was no answer to the plea, as the terms of the contract must govern, and the question of knowledge was immaterial. *State Mut. Fire Ins. Co. v. Arthur*, 30 Penn. St. 315. 1858.

§ 52. Plea of change of occupation, whereby the risk had been increased beyond the risk as described in the survey. Reply, denying increase of risk. *Held*, that the only issue presented was, whether the new use of the property, as described in the plea, involved greater risk than the occupation described in the survey, not the actual occupation at the time of the survey; and that the instruction of the court below to the jury, to determine what was the risk described in the survey, and, in so doing, they might inquire whether there was a misdescription, or a mutual mistake in the survey, and whether, therefore, the survey should be reformed, and whether the risk as actually assured was increased, was wrong, because no such issue was in fact presented, and because such an issue would be improper in a court of law. *State Mut. Fire Ins. Co. v. Arthur*, 30 Penn. St. 315. 1858.

§ 53. Where the premium for an insurance had been paid, and an agreement for insurance made, but no policy issued, and after loss, in an action, a declaration stating that the defendants in consideration of £20, paid to them as the premium of insurance of £1,500, on certain property described, promised to insure him against loss or damage by fire to the amount of £1,500, until notified to the contrary, subject to the conditions of the policy—that is, the policy usually issued by the defendants in like cases; that the property was destroyed by fire, and although the plaintiff had done all things necessary on his part, yet defendants had not paid him the sum insured, is bad, the action for non-payment of the money not being maintainable without a policy under defendant's corporate seal. It seems, however, that assured might have remedy at law in an action for not delivering the policy, or he might be relieved, in equity. *Jones v. Provincial Ins. Co.* 16 Upper Canada, Q. B. 477. 1858.

§ 54. On the 15th Dec., 1855, at special term, an order was made in this action that it “be referred to A. I. Perry, Esq., of the city of New York, as a sole referee,

only to ascertain and determine the amount of any loss sustained by the plaintiff, for the recovery of which this action is brought." In August, 1856, the referee made his report, finding the amount of loss to be \$401.74. The cause was tried in February, 1857. Upon the trial, the referee's report was read in evidence, together with the proofs of fire, &c. The jury found for the assured the amount reported by the referee, and upon their verdict, judgment was entered in February 15th, 1857. On the 20th of the same month exceptions were filed to the referee's report; *Held*, that on an appeal from judgment, it was not correct practice to review the referee's report. The time to object to the report was before it was read to the jury; it might have been excepted to, and reviewed on special motion. *Ehlen v. Rutgers Fire Ins. Co.* 2 Bosw. N. Y. 482. 1858.

§ 55. Declaration on a policy of insurance alleged that it was "subject to such conditions as are contained in the printed proposals issued by the said company," and that the plaintiff had kept all conditions precedent on his part, "according to the true intent and meaning of the said policy, and of such conditions as are contained in the printed proposals issued by the company." Defendants pleaded that the policy was "subject to such conditions as are printed on the back of said policy," and that among such conditions was one (setting it out) which the plaintiff had broken. The plaintiff demurred, on the ground that the condition pleaded was not shown to be contained in the printed proposals; *Held*, that the plea was good. *Jacobs v. Equitable Fire Ins. Co.* 18 Upper Canada, Q. B. 373. 159.

§ 56. Where the contract is to pay such portions of the premium notes and at such times as the directors may require agreeably to the act of incorporation and by-laws, in an action for assessments, the declaration must allege the assessments to have been made in conformity to the act and by-laws. *Atlantic Mut. Fire Ins. Co. v. Young*, 38 N. H. 451. 1859.

§ 57. In an action on a policy of insurance, defendants pleaded a communication opened between the building where the goods insured were and the building adjoining, without notice to them, contrary to one of the conditions of the policy. At the trial it appeared that they had mis-described the alteration on which they intended to rely, but it was also shown that such alteration had not in any way caused or contributed to the fire; *Held*, that under these circumstances an amendment of the plea was properly refused. *McKenzie v. Times & Beacon Ins. Co.* 17 Upper Canada, Q. B. 226. 1859.

§ 58. The materiality of the disclosure, or concealment, of the nature of the interest or title of the insured, is a question of fact which must be submitted to the jury; and a prayer, omitting to do so, is for this reason defective. *Franklin Fire Ins. Co. v. Coates*, 14 Md. 285. 1859.

§ 59. Where policy provided for "payment of losses within sixty days after proof and adjustment, and reserved the right to rebuild or repair or replace personal property," and the declaration of assured averred that the money had not been paid or any part of it, but failed to aver that the company had not "replaced and restored the articles lost," but obtained judgment against the insurer; *Held*, that such averment, though not formal and not sufficient on demurrer, was aided after verdict; as the assured could not recover, until they showed the loss of the property and a breach of the covenants by the insurers. *Howard Fire & Marine Ins. Co. v. Cornick*, 24 Ill. 455. 1860.

§ 60. The code in New York, (§ 173,) authorizes the court, after judgment, to amend any pleading, process, or proceeding, by adding or striking out the name of any party; by correcting a mistake in any respect; by inserting other allegations material to the case; or conforming the pleadings or proceedings to the facts proved. But after final judgment dismissing the complaint has been duly entered and rendered, and there is no allegation or

pretense of any mistake or omission therein, the court will not, on motion, amend such judgment. *New York Ice Co. v. North Western Ins. Co.* 32 Barb. N. Y. 534. 1860. But see same case, *post*, § 66.

§ 61. A bill of interpleader held to lie in favor of an insurance company against the landlord of the premises, which have been burned down after having been insured by him, (and who brought an action against the office on the policy,) and against the tenant, who filed a bill against the landlord and the office for a specific performance of an agreement for a lease, and claiming a right to have the money laid out in rebuilding the premises. *Paris v. Gilham.* *Jones v. Paris.* *Cooper's Ch. Cases*, 56. 1813.

§ 62. Where an action against an insurance company was tried by a judge without a jury, and the judge orally found sufficient evidence of the title of the assured, but, in afterwards filing his written finding, did not distinctly pass upon it; *Held*, that the fact of its being merely a technical point, was sufficient to prevent a reversal of the judgment for the want of a finding upon all the issues. *Hawkes v. Dodge County Mut. Ins. Co.* 11 Wis. 188. 1860.

§ 63. Where the declaration alleged that the articles insured were consumed by fire, when the proof showed that they were damaged only; *Held*, that the averment was equivalent to an averment of a total loss, although the proof was of a partial loss—not a destruction of the articles but an injury to them caused by fire, and that, in an action of debt upon the policy of insurance, the assured might recover for a partial loss under an averment of a total loss. *Peoria Marine & Fire Ins. Co. v. Whitehill*, 25 Ill. 466. 1861.

§ 64. Where an assignee after loss, brought an action on a policy, and the company set up for answer, 1st, a general denial of all allegations in the petition, and 2d,

that there had been "a settlement in full, by payment and receipt, in full of all claim or demand growing out of said insurance mentioned in plaintiff's petition;" *Held*, that the company could not introduce in evidence a judgment obtained against them as garnishees of the assignor, though they had no notice of the assignment till after such judgment. The matter of such garnishment and judgment could not come in under either part of the answer as it stood, but should have been specially pleaded. *Walters v. Washington Ins. Co.* 1 Iowa, 404. 1855.

§ 65. In an action on a policy on goods, the complaint set forth that the plaintiff "did sustain loss to the amount of \$231.08, by reason of a fire taking place in the cellar of the said premises above mentioned." *Held*, that the complaint was insufficient, because it alleged a destruction by fire, not of the goods insured, but of the building in which they were located. *Rodi v. Rutgers Fire Ins. Co.* 6 Bosw. N. Y. 23. 1860.

§ 66. The complainant brought suit to correct a policy and enforce its collection. The court having overruled the application for the correction of the policy, complainant asked leave to go on under his complaint and try the case as an action at law on the policy as it stood. But the Supreme Court was of opinion, that, as the case, as a proceeding for equitable relief, had been dismissed, there was nothing left in court, and ordered the whole case dismissed without prejudice. Afterward, the complainant, finding that the time limited in the policy for bringing an action had elapsed, on motion, had the order amended by entering permission to file a new complaint at law in the same suit. On appeal at general term it was held, that the Supreme Court exceeded its authority in making such amendment of its former judgment. Finally, in the Court of Errors, it was held, 1st, that if a case was left on the policy as it stood, after overruling the application to correct it, the Supreme Court should have proceeded to try it; 2d, that the Supreme Court had discretionary

power to make said amendment to its former judgment, and that the amendment was properly made; and 3d, that the Court of Errors had not jurisdiction on appeal to review said order of reversal made at the general term under the provisions of the New York Statute. *New York Ice Co. v. North Western Ins. Co.* 23 N. Y. 357. 1861. 21 How. N. Y. 296. 1861. 20 How. N. Y. 424. 1860. 10 Abb. Pr. N. Y. 34. 1860.

§ 67. A plea setting up a breach of warranty on the part of the insured as to the subject insured, is not sufficient unless it clearly appears in what particulars the subject said to be insured, was different from what it actually was represented to be at the time of insurance; and the rule is the same when there is a continuing warranty imposed on the risk by the terms of the policy. The precise facts must be alleged, upon which the warranty is claimed to arise, and for the occurrence of which, the policy is claimed to be avoided. *Merchants' & Manufacturers' Mut. Ins. Co. v. Washington Mut. Ins. Co.* 1 Hand. Ohio, 408. 1855.

§ 68. Assumpsit is the proper remedy on an agreement not under seal for additional insurance, endorsed on a policy. *Mutual Ins. Co. v. Deale*, 18 Md. 26. 1861.

§ 69. Where a policy issued to N. S. requires in the proofs of loss a certificate from the nearest notary, and such certificate is given running to C. S., and so described in the declaration, it is a fatal objection in the absence of an averment and proof that C. S. and N. S. are the same person. *Great Western Ins. Co. v. Staaden*, 26 Ill. 360. 1861.

§ 70. A complaint in an action upon a fire policy, in setting forth the contract of insurance, should state the conditions contained in the policy. *Bonner v. Home Ins. Co.* 13 Wis. 677. 1861.

§ 71. In a declaration on a policy, the insured is not bound to set out the original application ; or to aver or prove the truth of the statements therein contained. *Herron v. Peoria Marine & Fire Ins. Co.* 28 Ill. 235. 1862.

§ 72. Covenant will lie upon a renewal of a fire insurance policy, which provides that the same may be continued in force upon payment of premium and renewal receipt given therefor ; although such renewal receipt is not under seal. *Herron v. Peoria Marine & Fire Ins. Co.* 28 Ill. 235. 1862.

§ 73. Where the person with whom a contract of insurance was made, and who brings an action upon it, has no interest in the property which would authorize or enable him to make such a contract himself, he is bound to state affirmatively, in his complaint, that he acted as the agent of another, whose interest was sufficient to sustain such a contract. *Freeman v. Fulton Fire Ins. Co.* 38 Barb. N. Y. 247. 1862.

§ 74. In an action upon a fire insurance policy for the amount of a loss, the complaint must allege that the plaintiff had an interest in the thing insured at the time of the loss ; unless the claim was assigned to him afterwards, or unless he sues as trustee of an express trust. *Freeman v. Fulton Fire Ins. Co.* 14 Abb. Pr. 398. 1862.

§ 75. In an action against an insurer, the defendant not being presumed to know what prohibited articles were kept by the plaintiff when the loss occurred, is not bound to specify them in his pleadings. But where he specifies some without alleging that any others were kept, the jury should not be permitted to consider any except those specified. *Phoenix Ins. Co. v. Lawrence*, 4 Metc. Ky. 9. 1862.

§ 76. Where the declaration recited a policy made

with S., C., M. & B., under the name of S. and others, and the policy offered in evidence was with S. and others, without mentioning the names of C. M. & B., and there was evidence tending to show that C. M. & B. were jointly interested with S. in the property insured, and were the persons interested by the term "others;" *Held*, that there was no variance. *Sanders v. Hillsborough Ins. Co.* 44 N. H. 238. 1862.

§ 77. In a declaration upon a policy of insurance which contains a condition that in the event of a loss, the company may at its option restore the building; it is not necessary to negative the performance of this condition. It is a condition subsequent, and to be taken advantage of by way of defence: *Ætna Ins. Co. v. Phelps*, 27 Ill. 71. 1862.

§ 78. In Vermont, the amount of a premium note given a mutual insurance company determines the question of jurisdiction of particular courts, irrespective of the amount of the assessments thereon. *Windham County Mut. Fire Ins. Co. v. Pierce*, 36 Vt. 16. 1863.

§ 79. It is not a bar to a recovery on a policy that the declaration averred a performance of all conditions precedent, and the proof was of a dispensation with and waiver of performance. *Lycoming County Mut. Ins. Co. v. Schollenberger*, 44 Penn. St. 259. 1863.

§ 80. An allegation in an action on an insurance policy, that the property insured was damaged by fire, is a sufficient averment of damage by fire, sustained by the owner. *Keeler v. Niagara Fire Ins. Co.* 16 Wis. 523. 1863.

§ 81. An averment in the complaint that defendant "insured the plaintiff to the amount of \$3,000 on ten thousand bushels of oats, &c.," is a sufficient allegation of an insurable interest in the plaintiff. *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520. 1863.

§ 82. A general averment in a petition against an insurance company, that the defendants were authorized to effect insurance, covers fire as well as other insurances. A general averment of an agreement to insure, authorizes proof of an insurance against fire. *Western Massachusetts Ins. Co. v. Duffey*, 2 *Kansas*, 347. 1864.

§ 83. When the declaration on a policy of insurance alleges due notice and proof of the loss, according to the conditions of the policy, and the specifications of defence do not deny such allegations, the plaintiffs need not show that they had notified the defendants of the fire, or that they had furnished them with any proofs or statements of loss or damage, verified by oath or affirmation as required by the policy. *Fox v. Conway Fire Ins. Co.* 53 *Me.* 107. 1865.

§ 84. Where a policy of insurance contained a clause that if the assured keep gunpowder, the same shall be void, and the complaint averred that the plaintiff faithfully complied with the terms of the policy, and the answer did not deny the same, nor set up as new matter the keeping of gunpowder; *Held*, that the fact that gunpowder was kept could not be insisted on as a defense. *Cassacia v. Phoenix Ins. Co.* 28 *Cal.* 628. 1865.

§ 85. A defence of fraud to an action on a policy of insurance must be specially pleaded. *Flynn v. Merchants' Mut. Ins. Co.* 17 *La. An.* 135. 1865.

§ 86. In Pennsylvania, debt will lie on a policy of insurance renewed by a parol endorsement. *People's Ins. Co. v. Spencer*, 53 *Penn. St.* 353. 1866.

See Change of Venue—New Trial—Questions for Court and Jury. Assessments, § 5, 6, 31. Assignment, 20, 25. Bonds of Agents, 1. Burden of Proof, 5. Concealment, 22. Consummation of Contract, 11. Entirety and Divisibility of Policy, 1. Evidence, 50, 54. Foreign Insurance Companies, 19, 30. Fraud, 2, 6, 7. Garnishment or Trustee Process, 4. Increase of Risk, 7. Insurable Interest, 3, 14, 31, 38. Limitation Clause, 2, 11, 17. Notice of Loss, 3, 13. Other Insurance, 74, 78, 79, 86. Preliminary Proofs, 1, 13. Premium Notes, 21. Premium Notes in Advance, 6. Responsibility of Assignee for Acts of Assignor, 8. Risk, 9. Title, 11. Use and Occupation, 7, 9, 51. Waiver, 6, 8. Who may Sue, 5, 13, 23.

PRELIMINARY PROOFS.

§ 1. By the terms of the policy, the assured was required to declare on oath, "whether any, and what other insurance has been made on the same property." The preliminary proofs, with reference to this matter, stated, "that said property, or any part thereof, was not, nor has been insured, since the policy was taken out from the Protection Insurance Company." Upon the trial, the declaration averred that the statement as to other insurance, made in the preliminary proofs, was as follows: "that no other insurance had been made on the property aforesaid." The objection set up, was, 1st, that the declaration did not comport with the statement as made in the preliminary proofs; and 2d, that neither of them were in compliance with the condition of the policy, in that they did not show, that no prior insurance had been made; *Held*, that they were sufficient. *Lounsbury v. Protection Ins. Co.* 8 Conn. 459. 1831.

§ 2. Where preliminary proofs were made out in time and handed to the company, and assured afterwards requested permission to take copies of them, but after repeated evasions the company finally refused to let assured make copies of them, whereupon assured made out a new set and gave to the company several months afterwards; *Held*, that under the circumstances they were furnished in due season. *Cornell v. Le Roy*, 9 Wend. N. Y. 163. 1832.

§ 3. The insured in his preliminary proofs is not required to negative the exceptions of losses from design, invasion, public enemies, risks, &c., which are properly matters of defense. *Catlin v. Springfield Fire Ins. Co.* 1 Sumner, C. C. U. S. 434. *Lounsbury v. Protection Ins. Co.* 8 Conn. 459. 1831.

§ 4. The "particular account of loss and damage," required by a condition of the policy, refers to the articles lost and damaged, and not to manner or cause of the loss. *Catlin v. Springfield Fire Ins. Co.* 1 Sumner C. C. U. S. 434. 1833.

§ 5. Where policy agreed to pay any loss or damage within sixty days after the rendition of the preliminary proofs; *Held*, that such proofs must be given to the company sixty days before suit. *Harris v. Protection Ins. Co.* 1 Wright, Ohio, 548. 1834.

§ 6. It is necessary for assured to establish, on the trial, his interest in the subject insured; but he need not state the nature of his interest, in the affidavit, which forms a part of the preliminary proof, there being nothing in the conditions of the policy requiring him so to do. *Gilbert v. North American Ins. Co.* 23 Wend. N. Y. 43. 1840.

§ 7. Where, in a policy of \$1,000 on building, and \$300 on goods, requiring the usual "particular account of loss and damage," the assured made a "general statement," that the value of his goods at time of fire was \$1,495, without any specification because of the loss of books and accounts; *Held*, that this clause requiring an account of loss must be liberally construed in favor of the assured, and that the statement was, therefore, under the circumstances, sufficient. *McLaughlin v. Washington County Ins. Co.* 23 Wend. N. Y. 525. 1840.

§ 8. Where company after a loss declined to pay "because assured had taken a subsequent insurance without notice, and had in other ways acted unfairly," and nothing further was said; *Held*, that they had thereby waived the production of preliminary proof. *Charleston Ins. & Trust Co. v. Neve*, 2 McMullen S. C. 237. 1842.

§ 9. Where one of the conditions of a policy against

fire, require as a part of the preliminary proof without which no recovery can be had, a declaration under oath, "whether any, and what, other insurance has been made on the same property," the insured will forfeit his right to recover by failing to comply with this condition. *Battaille v. Merchants' Ins. Co. of N. O.*, 3 Rob. La. 384. 1843.

§ 10. Where notice of loss is given immediately, a delay of nineteen days, from the date of the fire, in presenting preliminary proof, is not unreasonable. *Wightman v. Western Marine & Fire Ins. Co.* 8 Rob. La. 442. 1844.

§ 11. Where policy stipulated that the loss should not be payable until the assured had given notice of the loss, furnished an account thereof, &c., and the court, assuming that these stipulations of the policy had been complied with, instructed the jury, that the plaintiff was entitled to recover; *Held*, that the court erred, as these were questions for the jury. *Franklin Fire Ins. Co. v. Hamill*, 6 Gill, Md. 87. 1847.

§ 12. The provisions in this policy as to notice and proof of loss, were very general, being as follows: "and in case of loss the same is to be paid in ninety days after proof thereof," and the company shall have the right to replace, &c. After loss assured wrote a letter stating that he had sustained damage by fire, under policy No. 8650, and requesting that he should be indemnified according to the terms of the policy; no objection being made at the time by the insurer, or further particulars called for; *Held*, that they could not be taken as an objection to assured's right to recover upon the trial. *Heath v. Franklin Ins. Co.* 1 Cush. Mass. 257. 1848.

§ 13. Formal defects in the preliminary proofs of loss, may be regarded as waived by the insurers placing their refusal to pay on other grounds; and evidence of such

waiver may be given under an averment of performance. *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278. 1848.

§ 14. Where an attempt was made by assured to comply with the contract of insurance, in reference to preliminary proofs, and afterwards the company, without notifying assured that his affidavit was insufficient, made an examination and pursued the inquiry to satisfy themselves, taking other affidavits, and placing them in the hands of their agent; *Held*, that the finding of the jury that this was a substantial compliance with the terms of the contract, would not be set aside. *Sexton v. Montgomery County Mut. Ins. Co.* 9 Barb. N. Y. 191. 1848.

§ 15. A refusal to pay the loss because no obligation to insure was ever entered into, the contract being incomplete at the time of the loss, operates as a waiver of the necessity for the production of the preliminary proofs required by the condition of the policy. *Taylor v. Merchants' Ins. Co.* 9 How. U. S. 390. 1850.

§ 16. The authenticity of papers, offered as evidence that the proper preliminary proof was given to the company, is a question for the jury; therefore it is no ground of exception, that the court permitted *ex parte* affidavits to be read to the jury, as evidence that preliminary proof had been given. *Klein v. Franklin Ins. Co.* 13 Penn. St. 247. 1850.

§ 17. If insurer refuse to pay a loss because assured refused to submit to an examination under oath, as required by the policy, they cannot afterwards object to his failure to comply with other requisitions of the policy as to mode of proof. *Phillips v. Protection Ins. Co.* 14 Mo. 220. 1851.

§ 18. If companies decline to pay loss for other reasons than defects in notice or proofs, they will be held to have waived the right to a more particular notice. *Hart-*

ford Protection Ins. Co. v. Harmer, 2 Ohio State (22 Ohio), 452. 1853.

§ 19. Compliance with a stipulation requiring the insured to deliver full particulars of the loss within three months, is a condition precedent to the right of assured to recover for the loss. *Mason v. Harvey*, 8 Wel. Hurl. & Gord. Exch. 819. 1853.

§ 20. Where the assured from loss of books and vouchers, could not furnish the "particular account" required by conditions of the policy, a statement of the gross amount lost, and circumstances of the loss, under oath, was held sufficient. *Norton v. Rensselaer & Saratoga Ins. Co.* 7 Cow. N. Y. 645. 1827. *Bumstead v. Dividend Mut. Ins. Co.* 2 Kern. N. Y. 81. 1854.

§ 21. Where the conditions of a policy required that assured should state in his preliminary proofs "the value of the property lost and the nature and value of his interest therein," and until this was done the loss would not be payable; *Held*, that the rendition of such an account was an essential pre-requisite to the right of recovery; and a statement that the property was entirely destroyed, and a valuation given in the original application, was not a compliance with the condition. *Wellcome v. People's Equitable Mut. Fire Ins. Co.* 2 Gray, Mass. 480. 1854.

§ 22. When asked "what further proof of loss was required," the president answered, the policy will show that;" *Held*, that this answer was not a tacit admission that there was no objection taken to any defect in the preliminary proof that had been furnished, nor a waiver of such proof. *Spring Garden Mut. Ins. Co. v. Evans*, 9 Md. 1. 1856.

§ 23. Where assured had served several papers on the company, and, upon the trial, gave them notice to produce

such papers, which the company refused to do, giving no reason or excuse for such non-production; *Held*, that the jury were not thereby authorized to presume or find that such papers contained the preliminary proof of the assured required by the 9th condition of the policy, and that such failure or refusal was not a circumstance from which the jury could legally presume, that such papers contained the proof.

In the absence of evidence to show that the preliminary proof, required by the policy, had been furnished, or that there had been a waiver on part of the company of its production; *Held*, that the assured could not recover. *Spring Garden Mut. Ins. Co. v. Evans*, 9 Md. 1. 1856.

§ 24. When preliminary proofs, furnished in good faith, are in any respect defective, common fairness requires that such defect be suggested, and that it be not held in reserve, to be used afterwards to obtain further delay of payment, or to defeat a suit brought for the money. *Peacock v. New York Life Ins. Co.* 1 Bosw. N. Y. 338. 1857.

§ 25. The affidavit of loss made by insured estops him to deny in a subsequent suit on the policy, any material facts therein stated. *Irving v. Excelsior Fire Ins. Co.* 1 Bosw. N. Y. 507. 1857.

§ 26. Assured's house was destroyed August 2, 1854, and on the 8th of same month, through his attorneys, he notified the company of his loss, informing them at the same time of the loss of his policy, and requesting them to send a copy of the record of the policy, with the necessary directions as to proper mode of verifying his loss, the expense of which he offered to pay. On the 10th of August, the treasurer of the company acknowledged receipt of the notice, and informed him that his claim would be laid before the executive committee for action, and on the 15th of August, again wrote, informing him that his claim had been rejected, for the reason that the policy had been can-

called for non-payment of assessments. *Held*, that this action of the company was a waiver of any right of the company to insist upon any particular form of notice, or kind of proof. *Noyes v. Washington County Mut. Ins. Co.* 30 Vt. 659. 1858.

§ 27. The refusal of an agent of an insurance company to pay the amount of the loss, upon the ground that they were "not upon the risk," is a waiver of the preliminary proof required by the policy. *Franklin Fire Ins. Co. v. Coates*, 14 Md. 285. 1859.

§ 28. Where a party becomes a member of a mutual insurance company by taking out a policy, he thereby assents to and becomes bound by the by-laws then in force, and one of these requiring that a particular account on oath of the circumstances of a loss should be given forthwith to the company, no action can be sustained for such loss, without furnishing such account within a reasonable time, although this provision is not embodied in the policy. *Woodfin v. Asheville Mut. Ins. Co.* 6 Jones Law, N. C. 558. 1859.

§ 29. Where one of the by-laws of a mutual insurance company required that the insured, within thirty days after the loss by fire, should give notice to the company, specifying the amount of the loss, the manner of it, and other particulars, as a condition to his right to recover; *Held*, that a general declaration to the insured by a traveling agent of the company, that "the matter would be all right with the company," was not a waiver of the necessity of such notice. *Boyle v. North Carolina Mut. Ins. Co.* 7 Jones Law, N. C. 373. 1860.

§ 30. Policy required that in case of loss, the assured should state in his notice of loss and affidavit, "the value of such parts as remain." The notice sent by assured stated that the building was destroyed on a certain day, and

was a "total loss." The building was valued at \$2,500, and insured for \$1,500, and the value of the brick and stone work, unconsumed by the fire, was \$108.75. *Held*, that the notice of loss given was sufficient, and especially so, not having been objected to, on account of failure to state the value of materials left, or a more particular statement required. *Wyman v. People's Equity Ins. Co.* 1 Allen, Mass. 301. 1861.

§ 31. Where policy required the assured within thirty days after a loss to file a particular statement of such loss, the value of the property insured, &c., and unless such statement was filed within thirty days, the loss would not be payable, and no notice of the loss was given until nearly a year and a half after the fire. *Held*, that by the terms of the contract, the loss was not payable. And the facts that an agent only authorized to receive and forward applications, resided within one hundred feet of the insured property, and knew of the fire; that one of the plaintiffs saw the president of the company, long after the fire, and told him the reason why notice and proof of loss had been omitted; and the president replied that the company would be disposed to do what was right, that they knew at the time of the fire that it was their loss, and were surprised that they were not notified, and asked him to go before the directors; that he went before the directors, and afterwards at their request, sent them a statement of the loss; that they had several meetings on the subject, and finally declined to pay the loss, notifying the plaintiffs of such determination; are not sufficient evidence of a waiver of the provisions of the by-laws, with reference to proofs and notice of loss. *Smith v. Haverhill Mut. Fire Ins. Co.* 1 Allen, Mass. 297. 1861.

§ 32. Where the policy required the production of certain preliminary proofs, and the proofs furnished were defective; *Held*, that the mere reception of the proofs in silence did not amount to a waiver, and that the fact that the company did not object to the proofs, and gave to the

insured no notice of any deficiencies, and made no request for further particulars, only amounted to receiving them in silence, from which the jury were not authorized to infer a waiver. To make a case of waiver, silence and something more is required; and that something must be more than simply equivalent to silence. *Keenan v. Missouri State Mut. Ins. Co. and Ryder v. Same*—Supreme Court of Iowa, June Term, 1861.

§ 33. Where condition of policy required certain preliminary proofs, and at time of their presentation to the company the latter made no objection to them, but placed their refusal to pay the loss on the ground of fraud on the part of the assured. *Held*, that the company had thereby waived any defects in such proofs. *Peoria Marine & Fire Ins. Co. v. Whitehill*, 25 Ill. 466. 1861.

§ 34. Under a condition in a policy requiring that "all persons insured and sustaining loss by fire shall forthwith give notice to the company," and as soon thereafter as possible "deliver a particular account of such loss, signed with their own hands, and verified by oath or affirmation," a waiver by an agent of the company of the notice of loss, does not include a waiver of the particular account or proof required to be furnished. *Desilver v. State Mut. Ins. Co.* 38 Penn. St. 130. 1861.

§ 35. Among the conditions attached to a policy of insurance were the following: All persons sustaining damage by fire were forthwith to give notice to the company, and within forty days they were to "deliver in a particular account" of such loss or damage. Losses were payable by the company within three months, &c. Then followed this clause: "All communications and notices to the company must be post-paid, and directed to the secretary, at C." The statement of the loss was made out, sworn to, and deposited in the post-office, addressed to the secretary of the company at C., but was never received

by the company. *Held*, that the condition requiring the assured to "deliver in" the statement of loss, was a positive requirement of the policy on that particular subject, not superseded or nullified by the general direction to forward communications and notices by mail, and that in sending such statement by mail, the insured had not complied with the condition. *Hodgkins v. Montgomery County Mut. Ins. Co.* New York, S. C. General Term, 5th District, 1861. *American Law Register*, February, 1862, Philadelphia.

§ 36. If, after the preliminary proofs of a loss by fire under a policy of insurance, the officers of an insurance company visit the premises and converse with the insured and make no reference to the preliminary proofs, or raise any objection to them, while any defect therein may be remedied, and refuse to pay on other and distinct grounds, the insurance company will be estopped to set up any defect in the preliminary proof, although the conditions made part of the policy give explicit directions about proofs of loss, and the policy provides that no condition, stipulation, covenant or clause in the policy shall be altered, annulled or waived, except by writing indorsed on or annexed to the policy and signed by the president or secretary. *Blake v. Exchange Mut. Ins. Co.* 12 Gray, Mass. 265. 1858.

§ 37. Proofs of loss as required by the policy, must be furnished before an action for a loss can be maintained. *Roper v. Lendon*, 1 Ell. & Ell. 2 B. 825, (102 Eng. C. L.) 1859.

§ 38. Where preliminary notice and proofs are received and retained by the insurer without objection, and without notifying the insured of a formal defect therein, the insurer must be deemed to have waived all objection on account of such defect. *Great Western Ins. Co. v. Staaden*, 26 Ill. 360. 1861.

§ 39. Preliminary proofs of loss, though a condition precedent to the right of the insured to recover, may be waived by the insurer. *Commonwealth Ins. Co. v. Sennett*, 41 Penn. St. 161. 1861.

§ 40. Where a claimant having presented proofs of loss that were clearly defective, and which were objected to by the insurers, and subsequently served perfect proofs, notifying the insurers that they were intended as of the time of the delivery of the former proofs, and merely to obviate any technical objections; *Held*, that an action brought at a due period after the service of the defective proofs, but immediately after the delivery of the second proofs, was prematurely brought. *Kimball v. Hamilton Fire Ins. Co.* 8 Bosw. N. Y. 495. 1861.

§ 41. A policy of insurance provided that the insured, on sustaining loss by fire, should give notice to the company, or its agents, make oath concerning the value of the property insured, the interest of the insured, and other particulars usually stipulated for in such policies. A certificate was to be furnished, signed by a magistrate, of the good faith, &c., of the insured. A loss occurring, the local agent of the company was notified, verbally, immediately after the fire, and he suggested delay until the arrival of the adjusting agent. Shortly after, this agent arrived, and made an examination of the books and accounts of the insured, expressed himself satisfied and took the affidavits of the parties. He told them that no more was required of them, but that he would present the claim to the company. The company afterwards addressed a letter to the local agent, in which they based their refusal to pay the claim upon the sole ground that gunpowder was kept in the building, and made no objection to the sufficiency of the preliminary proofs. *Held*, that by these acts the company waived the provisions of the policy before stated. *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492. 1861.

§ 42. By the conditions and stipulations attached to

a policy of insurance, and subject to which it was issued and received, the insured upon sustaining damage by fire was forthwith to give notice to the company, and within forty days to "deliver in a particular account" of such loss or damage. The policy contained a further clause that "all communications and notices to the company must be post-paid and directed to the secretary at C." The statement of a loss was made out, sworn to, and deposited in the post-office, inclosed in a sealed envelope, postage paid, and addressed to the secretary of the company at C., but was never received by the company. *Held*, that the condition requiring the insured to "deliver in" the statement of loss within forty days was a positive requirement of the policy on that particular subject, which could not be deemed superseded or nullified by the general direction to forward communications and notices by mail; and that in sending such statement by mail, the insured had not complied with the conditions of the policy. *Hodgkins v. Montgomery County Mut. Ins. Co.* 34 Barb. N. Y. 213. 1861.

§ 43. Where a policy required the insured to furnish a certificate of the loss &c. from the nearest notary public; and the insured furnished a proper certificate from a notary, but not the nearest one, which was received by the agent and retained by the company without objection until the trial; *Held*, the agent having promised to pay the loss, that the defect in the certificate was waived. *Byrne v. Rising Sun Ins. Co.* 20 Ind. 103. 1863.

§ 44. The failure of the insured to specify any of the goods insured, "with particularity," as required by the policy, in their proofs of loss, if caused by their inability to do so in consequence of the total destruction of such goods, does not preclude them from recovering therefor. *Hoffman v. Aetna Fire Ins. Co.* 1 Robert. N. Y. 501. 1863. S. C. 19 Abb. Pr. 325, affirmed 32 N. Y. 405.

§ 45. A coal breaker was insured under a valued

policy; immediately after its destruction by fire, the insured wrote to the company, stating that his "coal breaker burnt down this morning," giving the number of his policy, and the amount of his insurance; *Held*, that such a statement of loss, though in the preliminary notices, was substantially a particular statement, and a compliance with the condition requiring it. *Lycoming County Mut. Ins. Co. v. Schollenberger*, 44 Penn. St. 259. 1863.

§ 46. If the underwriter intends to insist upon defects in the proof, he must notify the insured of that intention in time to afford him an opportunity to correct them. Conditions precedent are waived by such conduct on the part of the party entitled to insist upon them as is inconsistent with the purpose to require the performance of them. And contracts of insurance constitute no exception to the rule. *Post v. Ætna Ins. Co.* 43 Barb. N. Y. 351. 1864.

§ 47. If the directors neither make objection to the notice and proofs, nor ask for any further information in this respect, but base their objections upon the ground of over-valuation, and refer the matter to their secretary for adjustment, who offers to pay a certain amount, but less than the whole; the company thereby waives any defect in the notice or preliminary proofs. *Lewis v. Monmouth Mut. Fire Ins. Co.* 52 Me. 492. 1864.

§ 48. A policy of insurance was not payable till ninety days after due notice and proof of loss, in conformity to the conditions thereto annexed. The notice and proof of loss which was furnished to the insurers, in compliance with a requirement in the conditions that such notice should show in what manner the building was occupied, stated that it was occupied as a hotel. It appeared in proof that no license had been given to keep it as a hotel. A memorandum of special hazards annexed to the policy prohibited all unlawful business. *Held*, that an

action could not be maintained upon the policy. *Campbell v. Charter Oak Fire & Marine Ins. Co.* 10 Allen, Mass. 213. 1865.

§ 49. If an incorrect statement of a material matter has been made through mistake in a notice and proof of loss which were furnished to insurers, in compliance with a requirement in the conditions of insurance annexed to a policy, and no amended statement has been furnished to the insurers before the trial of an action upon the policy, the insured cannot be allowed to prove the mistake, and show that the facts were not as therein stated. *Campbell v. Charter Oak Fire & Marine Ins. Co.* 10 Allen, Mass. 213. 1865.

§ 50. Where a policy of insurance against fire provided that in case of loss the assured should give immediate notice, and as soon as possible render under oath a particular account of such loss, "stating whether any and what other insurance had been made on the property, giving copies of the written portions of all policies thereon;" *Held*, that the furnishing of such copies was a condition precedent, without the performance of which (if not waived by the company) no recovery could be had on the policy; and that the inability of the assured to give such copies on account of the loss of the policy afforded no excuse. *Blakeley v. Phoenix Ins. Co.* 20 Wis. 205. 1866.

§ 51. By a condition in a policy, the insured were bound, in case of loss, to give to the secretary a particular account of such loss or damage. An account was sent to the secretary, setting out the names of the partners, the number of their policy and amount insured therein, the value of their stock in the store, as estimated from their books, reciting insurances in two companies, and giving an account of an entire undivided loss, but without stating the amount of the loss or damage upon the policy of the defendant, nor that the loss was upon goods insured

under that policy, nor in what way that loss was ascertained. *Held*, not such a particular account of the loss and damage as was required by the policy. *Lycoming County Ins. Co. v. Updegraff*, 40 Penn. St. 311. 1861.

§ 52. The court below allowed a copy of the preliminary proof of loss to be received in evidence on the trial, instead of requiring the production of the original. The local agent of the company having testified, without objection, that he received notice of the fire, and made out the proof of loss himself; *Held*, that this was sufficient evidence that the preliminary proof had been received by the agent of the company, and that, as the insurance company did not object at the time to the sufficiency of such preliminary proof, it waived all objections to its sufficiency. *Warner v. Peoria Marine & Fire Ins. Co.* 14 Wis. 318. 1863.

See Books of Account and Vouchers, Examination under Oath, Certificate, Notice of Loss; also Agent, § 55. By-laws and Conditions, 13. Evidence, 58. Limitation Clause, 18. Pleading and Practice, 21, 69. Questions for Court and Jury, 12. Re-insurance, 3. Title, 18. Waiver, 1, 3, 4, 5, 7, 10, 11, 13, 14, 23, 24, 26, 27, 32.

PREMIUM NOTES.

§ 1. The power to take premium notes is implied by the power to insure. *McIntire v. Preston*, 5 Gilm. Ill. 48. 1848.

§ 2. A premium note is valid in the hands of a *bona fide* assignee, if insurance company had power to take it for any purpose. *McIntire v. Preston*, 5 Gilm. Ill. 48. 1848.

§ 3. If a policy is originally void, the premium note, given for the same, is also invalid. *Frost v. Saratoga County Mut. Ins. Co.* 5 Denio, N. Y. 154. 1848.

§ 4. The act of incorporation provided, that any member, neglecting to pay his annual assessment within thirty days from the day appointed for such payment, should cease to have his property insured until the day on which he pays, &c. The first section of the by-laws required each individual, on effecting an insurance, "to make payment into the treasury by note given for such percentum on the property insured as the directors shall require, the same being intended to cover the amount of risk during the term of insurance, and to be received as security, and payment in advance, of all such annual assessments as may hereafter be made on such insurance, on which note a part not exceeding three per cent., at the discretion of the directors, shall be paid immediately; the balance to be called for at such times as the directors deem requisite for the payment of losses or other expenses." The second section of the by-laws provided, "that if a member failed to pay such assessments as shall from time to time be made upon this balance of his deposit note, according to the provisions of the first section, he may be required to pay the whole of his deposit note, with costs," &c. The plaintiff failed to pay an assessment made upon his deposit note. *Held*, that the by-laws acknowledged the reception of the note to be payment in advance of future possible annual assessments, not exceeding the amount of the note; and that the assessments must, as against the company, be taken as paid by the note; and that the power of enforcing their payment as assessments, could no longer exist; that the plaintiff did not, by his failure to pay, cease to be insured, but was liable by the terms of the by-laws to be called on to pay the whole of the note. *Rix v. Mutual Ins. Co.* 20 N. H. 198. 1849.

§ 5. In an action on a premium note to a mutual insurance company, such notes furnishing the fund to which the other insured look for indemnity, the maker is estopped from denying that he had an insurable interest. He can only get rid of the note by surrendering his policy and taking it up. Nor can he reduce his liability on the note,

by setting up that he was only interested in part of the property described. *New England Mut. Fire Ins. Co. v. Belknap*, 9 Cush. Mass. 140. 1851.

§ 6. Surrender of premium note by an arrangement with company binding, unless impeached for fraud or mistake; even though there were unadjusted losses, on which the maker made no payment. *Hyde v. Lynde*, 4 Comst. N. Y. 387. 1851.

§ 7. Policy and premium note independent contracts; and default by one party does not absolve the other. A vote by the company to suspend insurances when notes not paid, affects neither note or policy, unless the insured, when first apprised of it, assents thereto. *New England Mut. Fire Ins. Co. v. Butler*, 34 Me. 451. 1852.

§ 8. In an action by an insurance company on a premium note, it is no defense to say that the company is insolvent; for an insolvent party may enforce valid contracts in his favor in law. *Alliance Mut. Ins. Co. v. Swift*, 10 Cush. Mass. 433. 1852.

§ 9. Note given to a mutual company cannot be collected, if policy was void *ab initio*. *Lynn v. Burgoyne*, 13 B. Monroe, Ky. 400. 1852.

§ 10. Where a member of a mutual insurance company, whose stock of goods was insured, sold them several months before the happening of a loss by fire; *Held*, that, for want of interest, his policy was avoided; and that he was not liable, therefore, for his proportion of the loss; his deposit note being only a means of securing the payment of assessments for losses during his membership. *Wilson v. Trumbull Mut. Ins. Co.* 19 Penn. St. 372. 1852.

§ 11. A premium note, given to a mutual insurance company, agreeing to pay said company a certain sum in such portions and at such time or times as the directors of

the said company may require, is a note payable by installments, at the election of the payee, on a discretion, and must therefore be regarded as a note for the full amount expressed as much as if it were payable absolutely in installments. In an action on such note the final jurisdiction of a justice must be determined by the amount of the note, without reference to the amount due. *Washington County Mut. Ins. Co. v. Miller*, 26 Vt. 77. 1853.

§ 12. By the charter of the plaintiff company, it may recover the whole amount of note, if maker fails to pay an assessment within thirty days after publication of notice. *St. Louis Mut. Fire & Marine Ins. Co. v. Boeckler*, 19 Mo. 135. 1853.

§ 13. The St. Louis Mutual Fire and Marine Insurance Company, under its charter, may retain premium notes until losses, liable to be assessed against it, are paid. *St. Louis Mut. Fire & Marine Ins. Co. v. Boeckler*, 19 Mo. 135. 1853.

§ 14. Where the charter and by-laws of the company provided for assessment in case of losses, not to exceed the amount of the premium notes; *Held*, that without such losses, no recovery could be had on the notes, although absolute on their face. *Insurance Co. v. Jarvis*, 22 Conn. 133. 1853.

§ 15. Where the charter of an insurance company requires the assignee of a policy to give satisfactory security for the residue of the premium note, it is not necessary that he should give his own note; leaving the note of the assignor, if that is satisfactory, is sufficient. *Durar v. Hudson County Mut. Ins. Co.* 4 Zab. N. J. 171. 1853.

§ 16. Defendant surrendered his policy to an agent of the plaintiff for cancellation, and it was marked cancelled on the policy and also on the books of the company. At

the same time the agent agreed to get defendant's premium note, but did not do so. In an action on such note for assessments; *Held*, that the cancelling of the policy did not discharge the note, so far as it was already liable for losses; and that the burden of proof was on the defendant to show that the agent had authority, express or implied, to promise the surrender of the note; and that he would not be authorized to make such promise merely by virtue of his authority to act as agent for the company in taking and transmitting policies. *Marblehead Mut. Fire Ins. Co. v. Underwood*, 3 Gray, Mass. 210. 1855.

§ 17. In an action on a policy, acknowledging the receipt of a premium note, no further evidence of the premium note or its contents is necessary. *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 20. 1855.

§ 18. Where a statute provided that "the matter in demand, in an action on note, shall be considered the amount of the note, deducting endorsements;" *Held*, that a premium note for \$189, given for insurance, and agreeing to pay in such sums and at such times as the company might require, was a note within meaning of the statute, and if the amount exceed \$100, the county court had jurisdiction, and that suit for assessments upon the same might be brought before the county court, although the aggregate of such assessments did not amount to \$100. *Farmers' Mut. Fire Ins. Co. v. Marshall*, 29 Vt. 23. 1856.

§ 19. Where the by-laws of a mutual insurance company provided that all the cash premiums and deposit notes received by the company, for the insurance of personal property and real estate, should be deemed the absolute funds of the company to be applied in payment of expenses, losses by fire, and returns of premiums; *Held*, that under the by-laws of this company, the deposit notes were made a part of the absolute funds of the company, and as such collectable at the discretion of the directors, without any regard to the validity of the assessment, for the pay-

ment of debts or liabilities of the company, and that such a by-law was not in conflict with the Revised Statutes, chap. 37, § 31. *Long Pond Mut. Fire Ins. Co. v. Houghton*, 6 Gray, Mass. 77. 1856.

§ 20. Where an agent in effecting an insurance in a mutual company represented to the applicant that the company had a large surplus, and that \$5 would be all that the applicant would have to pay upon his insurance, and the applicant thereupon gave a premium note agreeing to pay every assessment within thirty days, or else to pay the whole note at the election of the company; *Held*, that the representations of such agent could not be admitted to vary the written stipulations of the note, in suit upon the same, for assessments. *Farmers' Mut. Fire Ins. Co. v. Marshall*, 29 Vt. 23. 1856.

§ 21. Where an agent, authorized to take applications, receive premiums, and premium notes, for insurance, represented that the company was solvent, and had a capital of \$275,000, &c., and thereby induced defendant to take a policy, and it afterwards appeared that the company was insolvent at the time; *Held*, that the company was bound by the agent's fraudulent representations; and that defendant, upon discovery of the fraud, might rescind the contract; and, by restoring the other party to the condition in which he stood previous to making the contract, might claim a return of his premium note, provided he did so at the earliest moment after discovering the fraud; but unless the defendant aver in his answer that he did this, the fact can not be proved on the trial. *Devendorf v. Beardsley*, 23 Barb. N. Y. 656. 1857.

§ 22. Policy and premium notes are not dependent contracts; but if policy is avoided by acts of assured, the premium note remains in full force, subject to assessments, until assured surrender the policy, and the company receive notice of such surrender. *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328. 1857.

§ 23. No action can be sustained on a "premium note," given to a mutual insurance company, in New York, since the act of 1853 took effect, either by the company or its receiver, except it be to pay for losses or expenses, actually accrued while such note was in force, and after assessment. Assessment, or apportionment, in a condition precedent, necessary to be averred in the complaint and proved at the trial. *Devendorf v. Beardsley*, 23 Barb. N. Y. 656. 1857. *Toll v. Whitney*, 18 How. N. Y. 161. 1858. See also, *Savage v. Medbury*, 19 N. Y. 32. 1859.

§ 24. In an action upon a premium note, for the recovery of the whole note, because of the non-payment of an assessment; *Held*, that the recovery for the whole amount of the note was in the nature of a penalty, and there being no express agreement to pay interest, interest was not recoverable under a penalty. *Bangs v. McIntosh*, 23 Barb. N. Y. 591. 1857.

§ 25. The New York statute of 1849 required mutual insurance companies, before commencing business, to procure the certificates of the Comptroller and Secretary of State, showing that the company had received premium notes in advance to a certain amount, payable within twelve months. The company in this case issued a policy, and took an ordinary premium note, payable in such portions and at such times as the directors, agreeably to the charter and by-laws, might require; *Held*, that this was not such a note as the company was authorized to take before obtaining the certificates of the Comptroller and Secretary of State; and that, as the note and policy were executed before the company had authority to enter into such contracts, they were both void. *Williams v. Babcock*, 25 Barb. N. Y. 109. 1857.

§ 26. Where a premium note was payable in assessments of which a certain notice was to be given; *Held*, that a receiver of the company could not enforce collection by suit until the conditions of payment had been satisfied

by levying assessments and giving the required notice thereof. *Williams v. Babcock*, 25 Barb. N. Y. 109. 1857.

§ 27. Where the charter provided that "notes received in advance of premiums on open policies shall in no case be deemed liable for any losses that may accrue beyond the actual earnings on such policies," and a premium note, for a nominal premium upon an open policy, is given, after the company has been organized and commenced business; is a "premium note" and not a "subscription or capital stock note," and the maker is liable to the company on such note only to the amount of the actual premiums upon risks assumed by the company and endorsed on the policy, and a receiver of the company can recover no greater amount. *Elwell v. Crocker*, 4 Bosw. N. Y. 22. 1858.

§ 28. It is no defence to an action on premium note, that the company became insolvent before the expiration of the policy. *Sterling v. Mercantile Mut. Ins. Co.* 32 Penn. St. 75. 1858.

§ 29. A premium note given to a mutual company, is not void because the charter of the company was to expire by limitation, prior to the expiration of the contract of insurance. The policy is valid for the unexpired term of the charter. Nor is the assured entitled to any "rebate or reduction" from the amount of the assessment, or from the amount of the premium note, because of that fact. *Huntley v. Beecher*, 30 Barb. N. Y. 580. 1859. See also, *Huntley v. Merrill*, 32 Barb. N. Y. 626. 1860.

§ 30. Where the contract is to pay such portions of the premium note and at such times as the directors may require agreeably to the act of incorporation and by-laws, in an action for assessments, the declaration must allege the assessments to have been made in conformity to the act and by-laws. *Atlantic Mut. Fire Ins. Co. v. Young*, 38 N. H. 451. 1859.

§ 31. Where the charter of a mutual company provided that if a member neglects for a certain time to pay any sums assessed upon his premium note, a suit may be brought and the whole amount of the deposit note may be recovered; the whole note may be recovered in an action on the note alone, and against the maker only. *Huntley v. Merrill*, 32 Barb. N. Y. 626. 1860.

§ 32. A note given to a mutual insurance company in New York, to be used as a premium note only, cannot be used as a part of the original capital stock, on which the company is organized; and if so used without the maker's knowledge or consent, it is a misappropriation that does not bind him, being a fraudulent perversion of its object and design. The note in such case is invalid, except in the hands of a *bona fide* holder, and the company or its receiver is not a *bona fide* holder. The burden of proving it an original capital note is upon the company, and evidence on part of maker, showing the purpose for which such note was given, is admissible. The fact of the note being made before the company was organized, makes no difference. If the note was given to an agent of the company, they must be deemed to have had notice of the purpose for which it was given. *Bell v. Shibley*, 33 Barb. N. Y. 610. 1861.

§ 33. This was an action on a policy to S., payable in case of loss to C. S. was described as of Roxbury, Mass. One of the by-laws referred to in the policy provided that "if the assured shall neglect, for the term of thirty days, to pay his premium note, or any assessment thereon, when requested to do so, by mail or otherwise," the policy should become void. An assessment was made on the premium note of S., and notice thereof, with a request for payment, was sent by mail to him at Roxbury, which was not received by him, because he had then removed to Pittsburg, Penn. *Held*, that under the provisions of the by-law, notice was complete when deposited in the post-office after the lapse of sufficient time for it to reach its

destination; that the company was not responsible for its delivery to the assured; that the change of residence did not affect the company until notified thereof; and that as the assessment had remained unpaid for more than the space of thirty days after the notice should have been received in the post-office at Roxbury, the policy was void. *Lothrop v. Greenfield Stock & Mut. Fire Ins. Co.*, 2 Allen, Mass. 82. 1861.

§ 34. By the terms of the charter of a mutual insurance company, each member was entitled to have his premium notes surrendered to him at the expiration of his term of insurance, upon payment of his share of losses and expenses to that time; or upon alienation of the property insured, surrender of his policy, and like payment of his share of losses and expenses; or upon payment of the whole of his premium notes and surrender of his policy. *Held*, in a suit by a receiver for the benefit of creditors, that a surrender of the premium notes upon payment of assessments to date, and cancellation of the policies by order of the directors of the company before its insolvency, was binding upon the company and its creditors. *Wadsworth v. Davis*, 13 Ohio St. 123. 1862.

§ 35. The non-acceptance of an amendment of the charter of a mutual insurance company, cannot be set up as a defence to an action on a premium note given by the defendant to the company in accordance with the provisions of the amendment. *Fell v. McHenry*, 42 Penn. St. 41. 1862.

§ 36. Persons who have given premium notes to a mutual insurance company, and have thus become members of the corporation, are not in a condition to assail the organization of the company, by way of defence to an action on such notes. *Cooper v. Shaver*, 41 Barb. N. Y. 151. 1862.

§ 37. Although the basis of all assessments on pre-

mium notes so long as the right to make them remains, continues to be "the original amount of the deposit note," yet the fund which secures them, whether in note or money, is only the amount remaining after crediting assessments already paid. Hence, "the whole amount of the deposit note" which the directors, in case of default, are authorized by the statute to sue for and recover, is not its face but the actual amount for which the note continues to stand as security. *Bangs v. Bailey*, 37 Barb. N. Y. 630. 1862.

§ 38. Premium notes, constituting the capital and being regarded as assets of a mutual insurance company; are ultimately liable for the payment of debts of all classes. It is therefore proper to assess them to pay losses on cash or stock policies issued by the same company. *Cooper v. Shaver*, 41 Barb. N. Y. 151. 1862.

§ 39. In an action on a premium note given on effecting an insurance brought to recover the whole amount on a default in payment of an assessment, the plaintiff is not entitled to interest on the amount of the note. *Bangs v. Bailey*, 37 Barb. N. Y. 630. 1862.

§ 40. Since the New York statute of 1853, premium notes given for more than five times the amount of the cash premium are illegal and void. *Otis v. Harrison*, 36 Barb. N. Y. 210. 1862.

§ 41. The maker of a premium note given to a mutual company, which does business in two classes in pursuance of its charter, is not liable for assessments to pay any other losses than those happening in the class in which the note was given. *Allen v. Winne*, 15 Wis. 113. 1862.

§ 42. Notwithstanding a policy be regarded as absolutely void, by reason of an unauthorized transfer, so far as to prevent an action for a loss by the assured against the

company, the former is not released from the obligation of his deposit or premium note until he has complied with a condition of the policy and charter, requiring "the payment of his proportion of all losses and expenses that may have accrued prior to the surrender" of the policy, or alienation of the property. *Hyatt v. Wait*, 37 Barb. N. Y. 29. 1862.

§ 43. Where a promissory note, on its face, is payable at such time or times as the directors of a mutual insurance company may, agreeably to their charter and by-laws, require, the presumption is that it was given and taken as and for a premium or deposit note; and no recovery can be had on such a note, unless it has been duly assessed.

But the plaintiff may allege and prove that the note, notwithstanding its form, was given and taken as and for a capital stock note and used as such in organizing the insurance company, and recover the whole amount thereof, without showing that it has been assessed; such notes being payable absolutely, at maturity. *Sands v. St. John*, 36 Barb. N. Y. 628. 1862.

§ 44. A note having been given to an insurance company for premiums, payable twelve months from date, and liable for losses occurring during that period, was assigned by the company as collateral for a loan to them; the drawer of the note paid to the pledgee the sum for which it had been pledged, which was less than its face, and obtained the note; the company becoming insolvent made an assignment to assignees, who brought trover for the note, claiming for the payment of losses which had occurred during the time for which it had been given. *Held*, that the plaintiffs could recover only the balance due on defendant's note, deducting the amount for which it had been pledged. *Fell v. McHenry*, 41 Penn. St. 41. 1862.

§ 45. The premium notes held by a mutual insurance company in Indiana, are not promissory notes within the

statute of that State authorizing a levy upon *choses in action*. Hubler v. Taylor, 20 Ind. 446. 1863.

§ 46. In an action by a mutual insurance company against one of its members, upon his premium note, the defendant is an adversary party; and as such is not bound to take notice of their proceedings in relation to his note. American Ins. Co. v. Schmidt, 19 Iowa, 502. 1865.

See Premium Notes in Advance and Assessments. Also Agent, § 59; Cancellation, 6, 7. Classification of Risks, 2, 3, 5, 6. Dependency of Policy and Premium Note, 5, 12, 19, 22, 24, 25. Foreign Insurance Companies, 1, 6, 10, 11, 16, 17, 18, 19, 20, 22. Illegality of Contract, 9. Insolvency, 5, 6. Mutual Companies and Members of, 1. Other Insurance, 47. Place of Making Contract, 4. Pleading and Practice, 40, 49, 56, 78. Receivers, 2, 3. Revival and Suspension of Policy, 1. Set-off, 8, 9, 10.

PREMIUM NOTES IN ADVANCE.

§ 1. The defendant gave his note to a mutual insurance company at its organization for \$1,000, payable in one year. During the year he incurred premiums to the amount of \$518; and at the expiration of the year he paid the premiums, and renewed his note for the whole amount. *Held*, that the maker had a right at the end of the first year to deduct the premiums of that year, and only give his renewed note for the balance; but as he had chosen to renew his note for the whole amount, in contemplation of certain benefits conferred in such cases, he was now bound for the whole amount of it, less the sum of the premiums for the second year. Hone v. Ballin, 1 Sandf. N. Y. 181. 1847.

§ 2. An action may be maintained on a renewed premium note in advance after the failure of the insurance company; and the fact that insurance was demanded, in

respect to such note, after the failure, and was refused, is no defense. *Hone v. Folger*, 1 Sandf. N. Y. 177. 1847.

§ 3. Notes given to a mutual insurance company at its organization, in order to provide a fund as a basis for doing business, are valid contracts for a valuable consideration, and may be enforced by the receiver on the insolvency of the company; and a parol agreement with the president, cotemporaneous with the execution of the note, to give it up at maturity, cannot be shown to defeat an action on the note; and a promise by the president of the company to give up the note, made after it fell due, is without authority and void. *Brouwer v. Appleby*, 1 Sandf. N. Y. 158. 1847. *Hone v. Allen*, contained in note to case of *Brouwer v. Appleby*.

§ 4. Whether premium notes were given at the organization of the company to constitute a fund to transact business on, or were simply notes in advance to secure premiums to accrue on an open policy in the ordinary course of business, is a question of fact for the jury. *Merchants' Mut. Ins. Co. v. Rey*, 1 Sandf. N. Y. 184. 1847. *Brouwer v. Hill*, 1 Sandf. N. Y. 629. 1848.

§ 5. A premium note was executed payable to the order of the maker, but never endorsed, and an open policy was issued on which nothing was ever written. The maker was elected one of the trustees of the company, and the note was included in the annual statement of the company, made out and published by order of the trustees. The note was afterward, by order of the trustees, and without consideration, delivered up, and the policy was cancelled. There was testimony tending to show that the note and policy were made in order to provide votes for an election of officers then about to come off. *Held*, that the note was to be regarded as a premium note in advance, or as an accommodation note; and, either way, it belonged to the assets of the company, and the trustees had no au-

thority to deliver it up without consideration, and the maker continued liable to the company and to its receiver on the contract. *Brouwer v. Hill*, 1 Sandf. N. Y. 629. 1848.

§ 6. A receiver of an insurance company may maintain action against the maker of a premium note in advance, and recover the amount of the note, where the same has been delivered up to the maker in violation of the rights of the company and its creditors. *Brouwer v. Hill*, 1 Sandf. N. Y. 629. 1848. *Tuckerman v. Brown*, 11 Abb. N. Y. 389. 1860.

§ 7. The defendant executed to the Croton Insurance Company his premium note in advance, and afterward took insurance in the company. The company having become insolvent, the receiver brought an action on the note; and the defendant on the trial sought to introduce evidence to prove an agreement with the president of the company, to the effect that the note was to be delivered up at maturity, and was to be liable only for losses accruing during the time it had to run. But the evidence was rejected, and judgment given for the amount of the note and interest, less the premiums on the insurance which defendant had effected. *Cruikshank v. Brouwer*, 11 Barb. N. Y. 228. 1851.

§ 8. Where charter authorized company to take premium notes in advance, of those designing to insure, and to use the same; *Held*, that such notes were for a valid consideration, and were effectual for the whole amount. *Brouwer v. Harbeck*, 1 Duer, N. Y. 114. 1852. *Derasmus v. Merchants' Mut. Ins. Co.* 1 Comst. N. Y. 371. 1848. *Brown v. Crooke*, 4 Comst. N. Y. 51. 1851. *Baker v. Cotter*, 45 Me. 236. 1858. *Howland v. Meyer*, 3 Comst. N. Y. 290. 1850.

§ 9. A premium note in advance was given, made pay-

able to the maker's order, and endorsed to the Croton Insurance Company. The board of trustees passed a resolution authorizing the pledge of the assets of the company to raise money to pay its debts. Subsequent to said resolution said note was taken up, and two others in lieu of it, and one of the two was pledged for money by the president of the company, and an action was brought on it by the assignee. Defense was made that the president had no authority to transfer the note in suit, because it was not in existence when said resolution was passed. *Held*, that, as the note was given in lieu of one which was in existence at the date of the resolution, the president had authority to make the transfer, if indeed any authority other than his general agency for the company was necessary. *Crook v. Mali*, 11 Barb. N. Y. 205. 1857.

§ 10. A premium note in advance may be transferred by the president on an insurance company, acting as its general agent, in payment or on account of losses; and the transferee may maintain action thereon against the maker. Such a transfer cannot be avoided by a receiver subsequently appointed, it not appearing that the transfer was made in contemplation of insolvency for the purpose of preferring a particular creditor. Such a transfer by the president does not come within the prohibition of 1 Revised Statutes 591, § 8, of New York. *Brouwer v. Harbeck*, 1 Duer, N. Y. 114. 1852. *Aspinwall v. Meyer*, 2 Sandf. N. Y. 180. 1848.

§ 11. Premium note in advance, paid by premiums of insurance by maker and his friends, and note given up; *Held*, to be a valid proceeding, binding on company and its receiver, though not ratified by a formal vote of the directors. *Emmett v. Reed*, 4 Seld. N. Y. 312. 1853. 4 Sandf. N. Y. 229. 1850.

§ 12. The defendant executed a premium note to an insurance company, whereby he agreed to pay the company or its treasurer \$10,000, "in such portions and at

such time or times as the directors may, agreeably to their charter and by-laws, require." The note was received as a part of the capital stock of the company. The directors afterward adopted a resolution, under which all the assets of the company, including the note in question, were transferred to the plaintiff, in trust, that he should collect them, and apply the proceeds to the payment of the debts of the company; *Held*, that this resolution was a requirement by the directors that the note should be paid, and was a substantial compliance with the condition upon which it was made payable. *Hill v. Reed*, 16 Barb. N. Y. 280. 1853.

§ 13. Premium notes in advance, given to mutual insurance companies under the provisions of the New York Statutes of 1849, are absolute and payable without any assessment. The company may enforce their collection at maturity, and devote the proceeds to the payment of losses, or to investments in other securities. *White v. Haight*, 16 N. Y. 310. 1857. *Bell v. McElwain*, 18 How. N. Y. P. 150. 1859.

§ 14. See, also, as to validity of premium notes in advance, power of company to transfer, &c., the following cases: *Holbrook v. Bassett*, 5 Bosw. N. Y. 147. 1859. *Scott v. Johnson*, 5 Bosw. N. Y. 213. 1859. *Smith v. Hall*, 5 Bosw. N. Y. 319. 1859. *Nelson v. Wellington*, 5 Bosw. N. Y. 178. 1859. *Brookman v. Metcalf*, 5 Bosw. N. Y. 429. 1859. *New York Exch. Co. v. DeWolf*, 5 Bosw. N. Y. 593. 1859. *Marine Bank v. Clements*, 6 Bosw. N. Y. 166. 1860. *Marine Bank v. Vail*, 6 Bosw. N. Y. 421. 1860. *Merchants' Bank v. McCall*, 6 Bosw. N. Y. 473. 1860.

§ 15. In an action on a premium note in advance, given to a company which divides its business into two departments, a stock and a mutual; it is not a defense that there were no unpaid losses in the mutual department. *Tuckerman v. Brown*, 11 Abb. N. Y. 389. 1860.

§ 16. A premium note given to a mutual insurance company as a part of the capital stock, under the act of 1849, in New York, and made payable "in such portions and at such time or times as the directors" may require, is in compliance with the 5th section of said act, requiring all such notes to be made payable at the end of or within twelve months from the date thereof, as it is in such form that payment could be required within the period specified by the statute. The statute of limitation, applied to such note, does not commence to run until payment has been required by the company or its receiver. *Howland v. Edmonds*, 33 Barb. N. Y. 433. 1861. But see *contra*, *Bell v. Yates*, 33 Barb. N. Y. 627. 1861.

§ 17. The by-laws of a mutual insurance company provided that any person giving an "advance note," should become a member thereof, and that the directors might give up any or all of the advance notes, whenever they should deem it for the interest of the company to do so. The defendants gave the company an advance note, specifying that it should be subject to assessments "at an equal per cent. with *all other* advance notes." *Held*, that the assessment was to be made upon all the advance notes remaining uncanceled at the time it was made; and that the signers of advance notes were liable for the full amount thereof, if required to pay the debts of the company. *Maine Mut. Marine Ins. Co. v. Swanton*, 49 Me. 448. 1861.

§ 18. An insurance company, although authorized to receive notes for advanced premiums to be written against, and to allow a certain interest thereon, is not authorized to allow five per cent. on the whole amount, without deduction for such sums as may be written against. An agreement to that effect is illegal, and the note cannot be recovered on, by the company. But as the statute does not make the note void, a third person, receiving it before it became due, for a valuable consideration and without notice of the illegal agreement, will be entitled to recover. *Chesbrough v. Wright*, 41 Barb. N. Y. 28. 1863.

See Set-off, § 5. Premium Notes, 27.

QUESTIONS FOR COURT AND JURY.

§ 1. Where plaintiff effected an insurance on a house, which had been previously insured by the party from whom plaintiff purchased, and the judge charged the jury, that if assured knew that there was a previous insurance, and neglected to disclose the fact to the insurers, it was such a concealment of a fact, material to the risk, as avoided the policy; *Held*, a misdirection, for which a new trial must be granted, as the question of its materiality was one of fact, that should have been submitted to the jury. *Tyler v. Aetna Ins. Co.* 12 Wend. N. Y. 507. 1834.

§ 2. Whether there has been such misrepresentation in the description of a building (described in application, which in this case was held to be representation merely) as will avoid the policy, is a question to be determined by the jury. *Farmers' Ins. & Loan Co. v. Snyder*, 16 Wend. N. Y. 481. 1836.

§ 3. The question, whether the stock of goods, described in one policy, is the same as those described in another, is a question properly for the jury; and their finding will not be disturbed. *Neve v. Columbia Ins. Co.* 2 McMullan, S. C. 220. 1842.

§ 4. Where policy provided, "that if the risk should be increased by any means within the control of assured, or premises occupied so as to render the risk more hazardous than at time of insuring," the insurance should be void; and it was proved that, after the insurance, the building had been leased, that a back building had been put up adjoining, and another building moved up to the addition, and that extensive repairs were going on in the house at the time of the fire; *Held*, that it was not for the court,

but for the jury to determine, whether the risk had been increased. *Grant v. Howard Ins. Co.* 5 Hill, N. Y. 10. 1843.

§ 5. Whether there has been such a concealment of a material fact as will avoid the policy, is a question to be submitted to the jury. *Sexton v. Montgomery County Mut. Ins. Co.* 9 Barb. N. Y. 191. 1848.

§ 6. Insurance was upon a starch manufactory. At time of insurance, assured represented that they were through manufacturing for the season, but afterwards had a fire built to expel the moisture from some starch that was left upon the rack, and whilst so doing the building was destroyed. Defense set up, that assured had misrepresented, in saying that the manufacturing was through for the season. The jury were instructed that the drying of starch was a part of the "process of manufacturing" if the same fires were used, as in the original process. *Held*, that it was not for the court, but for the jury to determine whether such drying was a "manufacturing" or not. *Percival v. Maine M. M. Ins. Co.* 33 Me. 242. 1851.

§ 7. Whether there has been an increase of risk or not, is a question of fact for the jury. *Gamwell v. Merchants' & Farmers' Mut. Fire Ins. Co.* 12 Cush. Mass. 167. 1853.

§ 8. The materiality of a fact concealed, is a question for the jury; and where it consisted of a previous fire in the same building, it is proper to instruct the jury, that they may consider the true cause of the fire, and not the suspicions or belief of the insured as to the cause. *Protection Ins. Co. v. Harmer*, 2 Ohio St. (22 Ohio,) 452. 1853.

§ 9. Where an application called for the distance of all buildings within ten rods, and stipulated over the signature of assured at bottom, that "all exposures within ten rods are mentioned;" *Held*, that it was error to submit to the jury the question as to whether certain buildings

within that distance were "exposures;" that the company had reserved the right to pass upon the extent—or whether at all—the risk would be increased by them, and to fix the rate of insurance accordingly. *Chaffee v. Cattaraugus County Mut. Ins. Co.* 18 N. Y. 376. 1858.

§ 10. Where a misrepresentation by the assured of his title, if material to the risk, will avoid the policy, the question of materiality is for the jury. *Mutual Ins. Co. v. Deale*, 18 Md. 26. 1861.

§ 11. If the notice of a loss to the insurers is sufficient in form, it is for the jury to determine whether it is sufficient in substance. *Witherell v. Maine Ins. Co.* 49 Me. 200. 1861.

§ 12. The sufficiency of the preliminary proofs of loss, is a question for the court. *Commonwealth Ins. Co. v. Sennett*, 41 Penn. St. 161. 1861.

§ 13. The jury must determine from the evidence the degree of particularity in the account of the loss sent to the insurance company the nature of the case admitted of. *Franklin Fire Ins. Co. v. Updegraff*, 43 Penn. St. 350 1862.

§ 14. It is for the jury to determine, as a question of fact from the evidence, whether the merchandise insured was destroyed in the "building" described in the policy. *Franklin Fire Ins. Co. v. Updegraff*, 43 Penn. St. 350. 1862.

§ 15. Where statements in an application are covenanted to be true so far as the same are known to the applicant, and material to the risk; the question as to their materiality and as to the knowledge of the applicant may properly be left to the jury: *Garcelon v. Hampden Fire Ins. Co.* 50 Me. 580. 1862.

§ 16. A limitation or condition in a policy of insurance intended for the benefit of the corporation may be waived by it, and the fact of waiver is a question for the jury. *Coursin v. Pennsylvania Ins. Co.* 46 Penn. St. 323. 1863.

§ 17. Whether spirituous liquors were included in the term "groceries" as used in a particular policy; *Held*, a question of fact for the jury. *Niagara Fire Ins. Co. v. DeGraff*, 12 Mich. 124. 1863.

§ 18. Where the defense to an action on an insurance policy is, that the insured in procuring the policy represented that the value of the property was much more than it in fact was; *Held*, that whether there was any misrepresentation as to the value of the property, and if so, whether it was material to the contract, was a question of fact for the jury. *Keeler v. Niagara Fire Ins. Co.* 16 Wis. 523. 1863.

§ 19. Whether a false presentation was or was not wilful and fraudulent, is a question of fact for the jury, under proper instruction as to the effect of such a representation. *Cumberland Valley Mut. Protection Co. v. Mitchell*, 48 Penn. St. 374. 1864.

§ 20. The question of identity of the property, where the description is different in two policies, is for the jury; where there is no dispute as to identity, but the question is whether the terms of the different policies is the same, this, being a subject of comparison between writings, is for the court. *Mitchell v. Lycoming Mut. Ins. Co.* 51 Penn. St. 402. 1865.

§ 21. Where there was an application and insurance on goods in a house described, and another application and insurance on a house also described, which latter house was burned; there being some evidence as to goods being

insured in the latter house; *Held*, that it was a question for the jury whether the goods burned were or not covered by the policy. *Beatty v. Lycoming County Ins. Co.* 52 Penn. St. 456. 1866.

§ 22. Whether a disclosure of the interest of an assured was material to the risk incurred, and would have enhanced the premium, is a question of fact for the jury. *Insurance Co. v. Chase*, 5 Wall. S. Ct. U. S. 509. 1866.

§ 23. Whether the description in a policy covers or fairly describes the property intended to be insured, is a matter of fact for the jury to determine, and the terms of the policy are to be reasonably construed with reference to the whole subject-matter. *Tesson v. Atlantic Mut. Ins. Co.* 40 Mo. 33. 1867.

See Agent, § 43, 46. Alienation, 69. Alteration, 1, 4, 5. Application, 8, 32. Assessments, 23. By-Laws and Conditions, 11. Certificate, 13. Concealment, 12. Construction, 12. Description of Property Insured, 6. Distance of other Buildings, 11, 14, 22. Encumbrance, 19, 26. Evidence, 4. Foreign Insurance Companies, 17. Increase of Risk, 23. Interest in Policy, 22. Limitation Clause, 18. New Trial, 7. Notice of Loss, 5, 29. Other Insurance, 64. Paid Contract, 15. Pleading and Practice, 58. Preliminary Proofs, 11, 16. Premium Notes in Advance, 4. Rebuild, Repair or Replace, 7. Title, 7, 36. Usage, 9. Use and Occupation, 2, 17, 32, 42, 52. Warranty and Representation, 20, 23. Watchman, 1, 2, 8.

REBUILD, REPAIR OR REPLACE.

§ 1. Interdict refused against an insurance company's re-building premises destroyed by fire, pending an action to have it found, that a lease of the premises was thereby terminated and that the insured was entitled to their value. *Bissel v. Royal Exchange Association Co.* 1 Cases in Court of Sessions, 165. 1821.

§ 2. The company have no right to rebuild or replace articles lost, unless such right is expressly given in the policy. *Wallace v. Insurance Co.* 4 La. 289. 1831.

§ 3. Under policy giving twenty days to elect to replace or rebuild, there is no jurisdiction in equity to restrain assured from removing or disposing of his goods, (before the time of expiration for the company to replace them,) so that they cannot tell what kind of goods they were; but it would be proper evidence to submit to the jury, and would authorize them to presume that the statement of the loss was in bad faith. *New York Fire Ins. Co. v. Delavan*, 8 Paige, N. Y. 418. 1840.

§ 4. Policy provided that insurers might rebuild or replace the property lost or destroyed, with other of the like kind or quality, or pay the money, at their election, within sixty days after loss. After the dwelling insured by this policy had been destroyed, the assured endorsed on the policy, "Pay the loss under the within policy to Joseph A. Tolman," which was assented to by the president of the company. The company then rebuilt the house, and plaintiff brought suit on the policy, for the amount of the policy in money; *Held*, that the order upon the policy, and assent of the company, did not bind the company to pay the money absolutely, but only operated as an assignment to Tolman of the assured's claim under the policy, without affecting in the least the right of the company to replace the building, or to pay the amount of the loss in money, at their election, according to the terms of the policy; and the company having replaced the building the action could not be maintained. *Tolman v. Manufacturer's Ins. Co.* 1 Cush. Mass. 73. 1848.

§ 5. Policy, on stock of stationer in Edinburg, in a London company, with clause giving company the option to pay or reinstate. The fire occurred April 13; the statement of loss was filed April 23; and on the 22d May,

after a variety of negotiations for a settlement, the company intimated their election to reinstate; *Held*, that there had been no such delay as to bar the company from exercising their election to settle in this way. *Sutherland v. Society of the Sun Fire Office*, 14 Cases in the Court of Sessions, N. S. 775. 1852.

§ 6. An insurance policy for \$3,000, on machinery, bound the company to pay that sum in case of loss or damage by fire, "unless they shall, within thirty days after proof of such loss or damage, furnish the insured with a like quantity of any or all of the said goods, and of the same quality as those injured by the fire, or shall make good the damage or loss by paying therefor," &c., *Held*, 1st, the company had the right, under this policy, to pay the damages in money, or repair the old machinery, within thirty days, so as to make it as good as it was before the fire; 2d, in covenant on this policy, the defendants may show by parol, that, after their liability to repair occurred by their election to do so, and before the expiration of the thirty days, they made a valid arrangement with the assured, by which the time for making the repairs was extended beyond the thirty days; and performance of this agreement by them discharges the covenant; 3d, enlargement of the time of performance, waiver of performance by the assured, accord and satisfaction, or tender of performance after the accrual by election of the liability to repair, are good defenses to an action on this policy; and parol proof is admissible to sustain them. *Franklin Fire Ins. Co. v. Hamill*, 5 Md. 170. 1853.

§ 7. Where policy reserved the privilege of replacing property destroyed within a reasonable time; *Held*, in an action upon the policy, that the question whether certain machinery insured had been repaired and replaced within a reasonable time, was a question for the jury, and not for the court, although the facts as to the length, and reasons of the delay in furnishing such machinery, were undisputed. *Haskins v. Hamilton Mut. Ins. Co.* 5 Gray, Mass. 132. 1855.

§ 8. A by-law of a mutual insurance company provided that the company might, within a reasonable time, rebuild, repair, or replace, the property lost or damaged; that when they elected to rebuild or repair, the assured should contribute one-third of the expense, and give sufficient security, and that the company "shall not be liable to any action for the loss until such security shall have been furnished, or unless the company shall neglect for thirty days thereafter to proceed to rebuild, repair, or replace, as the case may be." The property insured were machines for manufacturing boot and shoe laces, which having been destroyed, the company undertook to replace, and the assured refusing to receive or accept them when complete, brought an action on the policy. *Held*, that the by-law only suspended the right of action on the policy during the time within which the company had a right to rebuild, repair, or replace the property lost or damaged, and if such replacing and repairs commenced within the thirty days after the security had been furnished, had not been finished within a "reasonable time," the action on the policy might be sustained. *Haskins v. Hamilton Mut. Ins. Co.* 5 Gray, Mass. 432. 1855.

§ 9. An insurance company who had insured a house from fire, with an option to reinstate it, having elected, in the event of a fire, to reinstate it, employed the defendant, a builder, to reinstate it, who used the old walls so far as they remained; and when he had finished all but a little painting, gave one of the insured a small sum to complete it, and got him to sign a certificate that the work was complete, and then received payment from the company. The old walls not bearing the weight of the new work, "bulged." The assured sued the company for not duly reinstating the house, and they defended the action, without defendant's authority, and the assured recovered damages. The company then sued the builder on his contract, (the breach being an insufficient and imperfect reinstating,) and also for fraudulent representations, and for costs. The judge told the jury that the defendant was

only bound to put the building as near as possible in the same state as before the fire; and they found that he had done so, and that the building was not less secure than before. At the close of the case the plaintiffs relied on the omission of the painting; but the jury found that the value was nominal, and that in getting the certificate there was no fraud. The verdict was entered for the defendant, the judge telling the jury, that, in the absence of any express authority to defend the former action, the company could not recover costs; *Held*, that the direction was right, and that the plaintiffs were not entitled to a verdict, even for nominal damages; and that no amendment could be allowed. *Times Fire Assurance Co. v. Hawke*, 5 Hurl. & Norm. Exch. 935. 1859.

§ 10. Where a policy gives to the assurer the right of "re-instatement" in case of loss, at his option; and he elects after a loss to reinstate and is proceeding to do so, and the municipal authorities cause the building to be taken down as dangerous; the assurer is not thereby relieved from liability, although the dangerous condition of the building was not occasioned by the fire. Having elected to reinstate, he must either do it or pay damages for not doing it. *Brown v. Royal Ins. Co.* 1 Ell. & Ell. 2 B. 853. (102 Eng. C. L.) 1859.

§ 11. A policy of insurance declared expressly in the body thereof, that the same was made and accepted in reference to the terms and conditions thereunto annexed, one of which conditions was that in case of any loss on or damage to the property insured, it should be optional with the insurers to rebuild or repair the buildings within a reasonable time, on giving notice of their intention to do so, within thirty days after receiving the preliminary proofs of loss. Within the specified time after proof of loss, the insurers served upon the insured written notice of their intention to rebuild the building destroyed. *Held*, that no action would lie, upon the policy, to recover the amount of the loss, until the neglect of the insurers to comply with

their offer, to rebuild within a reasonable time. The insurers having elected to pay the loss by restoring the building, cannot be required to pay in any other way. *Beals v. Home Ins. Co.* 36 Barb. N. Y. 614. 1862.

§ 12. A wooden building situated within the fire limits of Detroit was injured by fire, and by the ordinances of that city could not be repaired without the consent of the common council, which was refused. The building was insured for \$2,000, and the policy contained a clause that in case of loss or damage to the property, it should be optional with the company to rebuild or repair the building within a reasonable time. The cost of repairing the building would be much less than the amount of the insurance, but without leave to repair, the building which before the fire was worth \$4,000, would be worth less than \$100. *Held*, that the insured was entitled to recover the whole insurance, and was not limited to such sum as would cover the cost of repair. *Brady v. North Western Ins. Co.* 11 Mich. 425. 1863.

§ 13. Where premises were insured in two separate companies for distinct sums, and each contract of insurance contained the same stipulations on the subject of electing to rebuild, and both companies united in notifying the insured of their election to rebuild after the loss; *Held*, that the insured might maintain an action against such companies jointly or severally for a breach of the contract to rebuild. *Morrell v. Irving Fire Ins. Co.* 33 N. Y. 429. 1865.

§ 14. A policy of insurance contained a condition to the effect that it was optional with the insurance company in case of loss to rebuild or repair the building within a reasonable time, giving notice of their intention to do so, within thirty days after service of the preliminary proofs. Immediately after a loss by fire the plaintiff laid a new foundation, and proceeded to erect a new brick building.

Within thirty days the defendants gave notice that they availed themselves of the option, and would rebuild the property. *Held*, that under these circumstances the contract became substantially a building contract, and an action upon the policy to recover the loss could not be sustained. *Beals v. Home Ins. Co.* 36 N. Y. 522. 1867.

See Damages, § 13, 14, 23, 26, 30, 31. Interest in Policy, 1, 5, 14. Successive Losses, 3.

RECEIVERS.

§ 1. An order of the court of chancery in New York, made upon a summary application, *Held*, not only obligatory upon the receivers, but binding upon all the creditors of the corporation, so long as it remains in full force. In matter of Receivers of Globe Ins. Co. 6 Paige N. Y. 102. 1836.

§ 2. The receiver of a mutual insurance company takes the place of the directors in ascertaining the claims upon the company, in determining upon the necessity of an assessment and the amount which each member of the company should pay upon his note, with this limitation upon his authority, that he cannot act without the authority and sanction of the court. But his authority depends not upon the order of the court, but upon the existence of facts rendering an assessment proper and necessary. The necessity of sanction and authority of the court is an additional restriction and limitation of the authority, and does not dispense with the other more important condition. Hence in such proceedings the courts do not adjudicate the liability of the company, or determine the amounts for which assessments shall be made. They merely sanction and authorize the acts of the receiver, who acts ministeri-

ally, not judicially. *Thomas v. Whallon*, 31 Barb. N. Y. 172. 1857.

§ 3. Receivers, from the mere fact of the insolvency of the company, cannot maintain a suit, under circumstances in which the company could not have done so, nor can they recover any greater amount than might have been recovered by the company. *Savage v. Medbury*, 19 N. Y. 32. 1859. *Devendorf v. Beardsley*, 23 Barb. N. Y. 656. 1857.

§ 4. A receiver of an insolvent insurance company has no power to waive strict proof of claims against the company upon policies issued by it. *Evans v. Trimountain Mut. Fire Ins. Co.* 9 Allen, Mass. 329. 1864.

See Assessments, § 20, 63, 65. Mutual Companies and Members of 1. Premium Notes in Advance, 2, 3, 6, 13.

RECOVERY BACK OF LOSSES PAID.

§ 1. A loss having been paid on a policy through ignorance that it had become void by a subsequent insurance contrary to express stipulation in policy, may be recovered back; nor can the defendant resist the re-payment of the money on the ground that he effected the insurance as the agent of the real owner, if such agency was not disclosed at time of procuring the policy. *Columbus Ins. Co. v. Walsh*, 18 Mo. 229. 1853.

§ 2. If a party insured caused the fire by which his goods were destroyed, and should by false representations recover from the insurer, he may be compelled to refund what has been paid him. *McConnell v. Delaware Ins. Co.* 18 Ill. 228. 1856.

§ 3. Insurers cannot recover money back, paid under a policy, which might have been avoided by reason of a misrepresentation, on the part of the assured, or his agent, if, at the time of payment of such loss, they knew, or upon inquiry might have informed themselves, of the grounds upon which they might have resisted the claim; but if the loss was paid in ignorance of some circumstances attending the loss, and which if known would have enabled them to resist the claim, the money may be recovered back. *Mutual Life Ins. Co. of New York v. Wager*, 27 Barb. N. Y. 354. 1858.

§ 4. This was an action brought against the assured and his agent to recover back a loss paid. The declaration alleged that, at the time of the fire, the assured had no interest in the premises; that defendants represented that assured had an interest in the premises, which representation was false and known to be false at the time; *Held*, that it was incumbent on plaintiffs to prove the fact, according to their allegation, that such representation was made by both defendants, or by one with the knowledge and authority and in behalf of the other, and then to prove that this representation was false, by showing that assured had no interest in the house, and sustained no loss by its being burnt, and thereby wrongfully obtained the payment of the loss not due. *Berkshire Mut. Fire Ins. Co. v. Sturgis*, 13 Gray, Mass. 177. 1859.

See Contribution, § 15.

REFORM OF POLICY.

§ 1. Memorandum for policy on "Grist Mill" handed to company, who executed policy on "Mill house," which insured carried off without examination. Policy corrected so as to conform to memorandum. *Phoenix Fire Ins. Co. v. Gurnee*, 1 Paige, N. Y. 278. 1828.

§ 2. Where the policy delivered to assured differed in its terms from the agreement for insurance, and it appeared that the clerk received the policy, placed it in the safe, without any examination on the part of the assured, then or afterwards, until the occurrence of the loss; *Held*, that there was no such acceptance of the policy by the assured, as would prove that they had waived the original contract, or taken this policy as a consummation of it, and as they still held the original agreement in writing, they might enforce it in equity. *Franklin Fire Ins. Co. v. Hewitt*, 3 B. Monroe, Ky. 231. 1842.

§ 3. Where agreement for policy, and policy as written, vary; or where mistake has been made by agent of insurers; a court of equity will compel a performance of original agreement, and correct the mistake. *Franklin Fire Ins. Co. v. Hewitt*, 3 B. Monroe, Ky. 231. 1842.

§ 4. Where in an application for insurance on a mill, to which applicant had only the equitable title, and which was encumbered to the amount of \$800.00, but all the facts were duly disclosed to the agent, who filled up the application and inserted that "assured was the owner of the mill and that premises were not encumbered," and afterwards communicated the true state of title to the company when sending them the application and premium note, and the company afterwards made assessments on

assured with a knowledge of these facts; *Held*, that a court of chancery had power to reform the contract and grant relief. *Harris v. Columbia County Mut. Ins. Co.* 18 Ohio, 116. 1849.

§ 5. Where bill is filed to compel issue of policy on a contract previously made, proof of such contract must be conclusive. If matter left in doubt, on the whole evidence, bill will be dismissed. *Suydam v. Columbus Ins. Co.* 18 Ohio, 459. 1849. *Neville v. Merchants and Manufacturers' Mut. Ins. Co.* 19 Ohio, 452. 1850.

§ 6. The policy was filled up in the name of A. Rex, mortgagee, of Philadelphia. The mortgage was made to him, but long before the insurance had been assigned to A. Rex, of Lebanon county. The application produced was A. Rex, of — County, in the handwriting of an agent of the insurers. The preliminary proofs were by A. Rex, of Lebanon county, and were received by the company without objection. The referee in making his award decided that the intention was to insure A. Rex, of Lebanon, and that the addition of "Philadelphia" was a clerical error, that might be rejected. *Held*, that there was no such plain mistake of fact or law, in such finding of referee, as to justify the setting aside the award. *Rex v. Insurance Co.* 2 Philadelphia, Pa. 357. 1858.

§ 7. Where a court of equity is asked to reform a written contract, on the ground of mistake, the mistake charged must be proved in the most clear and unequivocal manner; the proof must be free from all reasonable doubt, almost, if not quite incontrovertible, and clear and overwhelming. *National Fire Ins. Co. v. Crane*, 16 Md. 260. 1860.

§ 8. An error in the description, which crept into the policy through the mutual mistake and misunderstanding of the parties, was held in the Supreme Court not to be ground for decreeing a correction, the policy in such case

correctly representing the understanding of the parties, but the understanding being erroneous. *New York Ice Co. v. North Western Ins. Co.* 10 Abb. Pr. N. Y. 34. 1860. But on appeal, held, that such a mistake should be corrected. *New York Ice Co. v. North Western Ins. Co.* 23 N. Y. 357. 1861.

§ 9. The policy stipulated that the defendants "do insure William Longhurst (mortgagee), Dubuque, Iowa, against loss," &c. The petition averred that the interest of L. was a mechanic's lien; that the term "mortgagee," in the policy, was intended to describe that interest; that the nature of the interest was made known at the time of the application, and was mis-described by mistake of the agent of the defendants, who said that the description was sufficient to indicate the real interest. Issue was taken upon these averments, and a stipulation was filed, signed by the parties, that any evidence, to correct any mistake in the terms of the policy sued on, which could be given in a proper chancery proceeding, might be introduced in this proceeding. *Held*, that the policy, and testimony showing the mistake and facts averred, were competent and admissible in evidence under the pleadings and stipulation; overruling the objection taken, that the mistake alleged, consisting in the supposition that the term "mortgagee" would describe a mechanic's lien, was a mistake, not of fact, but of law, and could not therefore be corrected. *Stout v. City Fire Ins. Co. of New Haven*, Supreme Court of Iowa, June Term, 1861.

§ 10. The defendants having issued a policy to A. upon property which, in fact, belonged to B. his wife, were asked to correct this error, and to make the loss payable to the wife's mortgagee; and their secretary merely indorsed a memorandum that the loss, if any, was payable to the mortgagee. The mortgagee having accepted the policy with this indorsement, and without a correction of the mistake in the name of the assured; *Held*, that he could not recover, and that it was too late, after a loss, to alter or reform the policy. *Solms v. Rutgers Fire Ins. Co.* 8 Bosw. N. Y. 578. 1861.

§ 11. Where a mortgagee applied for insurance through the local agent of an insurance company, intending to procure an insurance of his mortgage interest and so stating to the agent, but the agent drew the application as for an insurance on the property itself, in the name of the mortgagor and as his property, the amount to be payable in case of loss to the mortgagee; and so made the application and had the policy so issued in the belief that such was the proper legal mode of effecting an insurance on the mortgage interest; *Held*, that the mistake could be corrected by a court of chancery although it was one of law and not of fact. *Woodbury Savings Bank v. Charter Oak Ins. Co.* 31 Conn. 517. 1863.

§ 12. Where application was made to an agent of an insurance company authorized to take risks, for a policy upon a mechanic's lien interest in real estate, and a policy was issued in which the interest of the assured was described as that of a mortgagee, both parties believing that the description embraced the interests of a mechanic's lien; *Held*, that the contract would be so reformed in equity as to make it express the real intent of the parties. *Longhurst v. Star Ins. Co.* 19 Iowa, 364. 1865.

§ 13. To afford grounds for reforming a policy for a mistake, the mistake must appear to have been mutual. *Cooper v. Farmers' Mut. Fire Ins. Co.* 50 Penn. St. 299. 1865.

§ 14. A court of equity will reform a policy or other written contract, upon parol evidence, when the agreement really made between the parties has not, through accident or mistake, been correctly incorporated into the written instrument; but both the agreement and the mistake must be made out by the clearest evidence, according to the understanding of both parties as to what the contract was intended to be. The court cannot supply an agreement that was never made. *Tesson v. Atlantic Mut. Ins. Co.* 40 Mo. 33. 1867.

See Agent, § 36. Construction, 15. Endorsements, 1. Evidence, 46. Limitation Clause, 24. Renewal of Policy, 1.

RE-INSURANCE.

§ 1. Every re-insurance in England, either by British subjects or foreigners, whether on British ships or foreign ships, is void. *Andree v. Fletcher*, 2 Term Rep. 161, 3 Term Rep. 266. 1789.

§ 2. By 19 George II., C. 37, S. 4, it is not lawful to make re-assurance, unless the insurer be insolvent, become bankrupt, or die; in either of which cases the assurer, his executors, administrators, or assigns, may make re-insurance to the amount of the sum before assured by him, provided it be expressed in the policy to be a re-insurance. *Andree v. Fletcher*, 2 Term Rep. 161, 3 Term Rep. 266. 1789.

§ 3. Re-insurance is a valid contract at the common law, and there is no difference in principle between re-insurance against fire, and re-insurance against loss by the perils of the sea. The risk assumed by the first underwriter, in relation to the subject-matter, constitutes an insurable interest. Where the act of incorporation gave to one company the power "to make contracts of insurance against loss by fire of any houses or buildings whatsoever, and of any goods, chattels, or personal estate whatsoever," and to the other the power "to make all kinds of insurance against losses by fire, of any houses or buildings whatsoever; and also upon all goods, wares and merchandise whatsoever;" *Held*, that a re-insurance was included in such power, and that the subject-matter of insurance was the same in the policy of re-insurance as in the original insurance, though the interest was different. In such contract, the condition of policy requiring preliminary proofs, &c., is complied with, by the first underwriter transmitting to the re-insurer, the proofs made by the original assured. *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.* 17 Wend. N. Y. 359. 1837.

§ 4. From the nature of the contract of re-insurance, and the want of privity between the re-insurer and the person first insured, it does not come within the rule, that the principal creditor is in equity entitled to the benefit of the contract of re-insurance. *Herckenrath v. American Mut. Ins. Co.* 3 Barb. Ch. N. Y. 163. 1848.

§ 5. The re-insurer is liable for the costs and expenses incurred in a suit between the original insured and the company re-insured, if the re-insurer withhold payment until the termination of such suit. *New York Central Ins. Co. v. National Protection Ins. Co.* 20 Barb. N. Y. 468. 1854.

§ 6. Re-assured can collect of re-insurer before payment to the original insured; and though the company re-insured become insolvent, the re-insurer is not released from payment in full, by reason thereof. *Eagle Insurance Co. v. Lafayette Ins. Co.* 9 Ind. 443. 1857. *Home v. Mutual Safety Ins. Co.* 1 Sandf. N. Y. 137. 1847.

§ 7. Re-insurers may make every defense the re-insured could then make, when loss remains unadjusted between re-insured and party originally insured, on the terms and conditions of the policy; and where the re-insured is not liable on the original policy, a recovery cannot be had against the re-insurer. *Eagle Ins. Co. v. Lafayette Ins. Co.* 9 Ind. 443. 1857.

§ 8. By the terms of the contract of November 30, 1854, the defendants "re-insure the American Mutual Insurance Company, of Amsterdam, upon the following policies issued by them," (a detailed statement of which policies was embodied in and formed part of the contract,) "loss, if any, payable to the assured upon the same terms and conditions, and at the same time, as contained in the original policies. Re-insured, from November 30, 1854, twelve o'clock at noon, to the expiration of the policy." The American Mutual Insurance Company becoming insolvent subsequent to taking out the above policy of re-in-

surance with the defendants, one of the parties originally insured brought an action to recover of defendants a loss sustained by him. *Held*, that the word "assured," as used in the contract of re-insurance, meant the party re-insured, and that the plaintiff had no interest in, or lien upon, the contract in question, and no right to maintain an action thereupon; that the money which the defendants might pay under it, would form part of the assets of the company, which insured plaintiff originally, and from which the plaintiff must be paid *pro rata* with the other creditors of the insolvent company. Held further, that parol evidence to show that the re-insurance was intended to protect the parties originally insured, and that the word "assured" was used with reference to that object, was inadmissible. *Carrington v. Commercial Fire & Marine Ins. Co.* 1 Bosw. N. Y. 152. 1857.

See Agent, § 17, 32. Concealment, 4. Contribution, 6. Interest in Policy, 10, 24. Usage, 5. Warranty and Representation, 27.

REMOVAL.

§ 1. Where neither the stock of goods insured, nor the house containing them, were touched by fire; but the goods were damaged in the removal of them, under a reasonable apprehension that they would be reached by the flames, which had caught the fourth house from that of assured in the same block; *Held*, that the injury sustained by the assured in the removal of his goods was not a loss which was covered by his policies against peril of fire. *Hillier v. Alleghany County Mut. Ins. Co.* 3 Penn. St. 470. 1846.

§ 2. Policy provided, that "in case of the removal of property to escape conflagration, the company will contribute ratably with the assured, and other companies interested, to the losses and expenses attending such act of salvage." A fire originated in a building adjoining the one containing the insured goods, which were removed, and in

removal part were lost, wet, stolen, and some burnt; *Held*, that the clause above, referred only to the expenses of saving what had escaped destruction, and that assured might therefore recover the entire loss and damage sustained by such fire, and not the proportion only which the amount insured bore to the whole value of the goods. It seems, that in the form adopted in ordinary policies, injuries to goods by wet, or by goods being lost or stolen in the confusion arising from the fire, and of the destruction, injury or loss of which the fire can be said to be the proximate cause, are within the terms of the policy. *Thompson v. Montreal Ins. Co.* 6 Upper Canada, 2 Q. B. 319. 1849.

§ 3. The circumstances, as they existed at the time, must determine the necessity for removal; and whatever loss or damage is necessarily sustained by such removal, when the danger of its destruction was so direct and immediate that a failure to remove would have been a gross negligence on his part, the insured is entitled to recover. The fire, under such circumstances, may be regarded as the proximate cause of any loss sustained. *Case v. Hartford Fire Ins. Co.* 13 Ill. 676. 1852.

§ 4. Where policy of insurance on a stock of millinery goods, provided that, "when property insured by this company is damaged by removal from a building in which it is exposed to loss by fire, said damage shall be borne by the assured and the insurers, in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant;" and one tenement of the building containing the property insured was on fire, and part of the insured stock was burnt, and balance removed; *Held*, that the amount of the loss and damage on goods removed must be borne by the insured and insurers, in such proportion as the whole sum insured bore to the whole value of the property at the time of a loss. *Wilson v. Peoria Marine & Fire Ins. Co.* 5 Minn. 000. 1861.

See other Insurance, § 17. Parol Contract, 2. Risk, 18. Theft, 4. Use and Occupation, 47. What Property is Covered by Policy, 15.

RENEWAL OF POLICY.

§ 1. A policy under seal contained clause that it might be renewed by timely payment of the premium. The insurance was continued from year to year by endorsements on the policy, which were not under seal, changing the dates, and also amounts to be insured. *Held*, that those endorsements did not continue the instrument as a specialty, and that an action for covenant would not lie to recover for a loss incurred, after the expiration of the first term; but opinion is given by Gibson, C. J., that plaintiff might have demanded a policy in conformity to the clause, and have maintained an action for a breach of it. *Luciani v. American Ins. Co.* 2 Whart. Pa. 167. 1836.

§ 2. Where a policy was for \$1,800 on a grist mill, and \$700 on machinery, and successive renewals, year after year, kept up the specifications noted in the renewal receipts until 1847, when the agent was changed, and after that the renewal receipts were in general terms, without specification as before; *Held*, that the intention was to renew in general terms, without any distribution of the risk. *Driggs v. Albany Ins. Co.* 10 Barb. N. Y. 440. 1851.

§ 3. In the written part of the policy, "fire and ice" were excluded from the risks assured by the company. The policy was renewed by an endorsement, in which it was stated, that it is "understood that the assured is not entitled to claim for any loss or damage arising from ice," and was afterwards renewed by another endorsement, as follows: "The within policy is renewed for one month for the sum of \$3,000, on brushes, as within described." *Held*, that this last renewal applied to the original policy, in which losses by "fire and ice" were excepted, and not to

the said policy as renewed by the first endorsement, and in which "ice" only was excepted; and therefore assured could not recover for a loss by fire occurring subsequent to the second renewal. *Honnick v. Phoenix Ins. Co.* 22 Mo. 82. 1855.

§ 4. If a company sees fit to renew a policy after it has full knowledge of the risk, any misrepresentations contained in the original application must be deemed to be waived; and the company are bound by the policy. *Witherell v. Maine Ins. Co.* 49 Me. 200. 1861.

§ 5. Where renewals of a policy originally issued to a party have been granted after his decease to his executors, without inquiry or representations, the company must be held to have insured such interest in the property as had become vested in the executors by the will, and by their acts as executors. *Phelps v. Gebhard Fire Ins. Co.* 9 Bosw. N. Y. 405. 1862.

§ 6. Where an insurance company with knowledge of the facts accepts from the assured the premium for a renewal, and renews the insurance, it will be deemed to have declared the contract of insurance to be valid, and to have waived a forfeiture, if any has occurred by reason of the omission of the insured to give notice of other insurances and have them endorsed on the policy. Under such circumstances, the company is precluded from asserting either that the renewal was inoperative, or that the policy became void immediately after it was renewed, by reason of circumstances of which it was fully cognizant at the time of renewal, on the principle of estoppel *in pais*. *Carroll v. Charter Oak Ins. Co.* 38 Barb. N. Y. 402. 1862.

§ 7. Where the insurers of property have, by their acts and conduct, acknowledged the interest in the premises of one who paid to them a premium for a renewal of the insurance for another term, they cannot deny his interest in a suit to recover the insurance money for a loss oc-

curing after such renewal. *New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221. 1863.

§ 8. Where the term for which an insurance is effected is about to expire, and a premium is paid for another term, for which a renewal receipt is given, under the conditions contained in the policy, such renewal receipt does not constitute a new agreement of insurance, but merely revives an expiring contract and continues it in force another term. And if a loss occurs within the new term, a recovery can only be had upon the original contract. *New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221. 1863.

§ 9. Each renewal of a policy of insurance is a new contract, and is subject to the local laws in force at the time of the renewal. *Brady v. North Western Ins. Co.* 11 Mich. 425. 1863.

§ 10. In 1846 a verbal agreement was made between an insurer and the insured that until one of the parties dissented the contract of insurance should be continuous, and the president of the insurance company should from year to year bring the renewal receipts and call for the premiums when he thought proper after they become due. In 1847 the president offered to the insured a renewal receipt for the year which would end in July, 1848, claiming a premium of \$30 instead of \$25, the amount previously paid. The insured assented to the change, paid \$25 and promised to pay the balance. *Held*, that the change of premium terminated the arrangement between the parties made in 1846, and that it required a new bargain to effect a continuing arrangement and to enable the insured to rely upon being called upon on behalf of the company for the premium, instead of the usual method of taking out renewal receipts each year as they were needed. *Baptist Church v. Brooklyn Fire Ins. Co.* 28 N. Y. 153. 1863.

§ 11. Where a renewal receipt has been issued to the assignee of a policy, and he has paid the premium, an

action of assumpsit will lie by him, as on an express agreement and promise of the insurance company to pay him for any loss which might occur. *Peoria Marine and Fire Ins. Co. v. Hervey*, 34 Ill. 46. 1864.

§ 12. Where an agreement is made by the agent of an insurance company, for the renewal of a policy, nothing being said respecting the amount to be charged, the insured has a right to suppose the renewal is to be at the rate formerly paid. *Post v. Ætna Ins. Co.* 43 Barb. N. Y. 351. 1864.

§ 13. One of the conditions annexed to a policy of insurance on property in Brooklyn was, that insurances on property out of the cities of New York and Brooklyn were to be made upon the written representations of the applicant, that insurances once made might be renewed, and that all insurances, original or renewed, should be considered as made under the original representation in so far as it might not be varied by a new representation in writing, which it should be incumbent on the assured to make in all cases where the risk had been changed either within itself, or by the surrounding or adjacent buildings. That if at or before the time of renewing any policy where the risk had been increased by the erection of buildings, or, by the use or occupation of the premises insured or the neighboring premises, the assured should fail to give information thereof, the policy and renewal should be void, and of no effect. There was no representation made when the policy was issued; the risk being taken on the report of the company's surveyor. *Held*, that there was nothing in the contract of insurance that bound the assured to give written notice to the company at the time his policy was renewed of the erection of a bakery by which the risk was increased. That the omission to give notice of the fact in written form was no breach of any warranty; and that the stipulation for notice at or before renewal, of an increased risk occasioned by the use or occupation of neighboring premises was satisfied by an oral communica-

tion of the fact to the company. That the first clause of the condition did not apply to policies granted upon property in New York or Brooklyn, upon a survey by the company itself. *Liddle v. Market Fire Ins. Co.* 29 N. Y. 184. 1864.

See Alienation, § 49. Assignment, 16. Increase of Risk, 33. Other Insurance, 76. Parol Contract, 6. Parol Evidence, 27. What Property is Covered by the Policy, 25.

RESPONSIBILITY OF ASSIGNEE FOR ACTS OF ASSIGNOR.

§ 1. Policy was taken out on stock, and permission given in policy to assign the same to a third party, in whose hands the policy was then left by assured; but the assignment not completed at that time, though it was completed and signed by assured after the loss. *Held*, that such third party might recover to the amount of his interest, although the original assured had deprived himself of his right to recover by taking subsequent insurance, without notice, contrary to the provisions of the policy. *Charleston Ins. Co. v. Neve*, 2 McMullan, S. C. 237. 1842.

§ 2. If a policy of insurance has been assigned to a mortgagee of the insured premises, with the assent of the company, a violation of the conditions, such as would avoid the policy in hands of the original insured, will not prevent the mortgagee from recovering to the extent of his interest. *Tillou v. Kingston Mut. Ins. Co.* 7 Barb. N. Y. 570. 1850.

§ 3. Where policy had been assigned to a mortgagee of the premises insured, with the consent of the company endorsed thereon, and mortgagee gave a new note to the company, in addition to the one given by the original as-

sured; *Held*, that this was in legal effect a new contract with the mortgagee, for a new and independent consideration, and that a subsequent alienation of, or additional insurance on the insured premises, by the original assured, did not avoid the policy in the hands of the assignee. *Foster v. Equitable Mut. Ins. Co.* 2 Gray, Mass. 216. 1854.

§ 4. A mortgagor took three policies on certain buildings, and assigned them with the consent of the company to the mortgagee. The latter brought suit on the policies in the name of the mortgagor, and the company set up in defense that the mortgagor, subsequent to the assignment of said policies, had obtained other insurance without notifying the company, in violation of a condition in said policies. *Held*, that such act by the assignor could not affect the validity of the policies in the hands of the assignee. But see § 9, post. *Traders' Ins. Co. v. Robert*, 9 Wend. N. Y. 404. 1832. See also *Allen v. Hudson River Mut. Ins. Co.* 19 Barb. N. Y. 442. 1854.

§ 5. Where policy has been assigned with the consent of the company, it is no longer in the power of assignor to do anything to impair the validity of the policy in the hands of the assignee. *Pollard v. Somerset Mut. Ins. Co.* 42 Me. 221. 1856.

§ 6. Policy issued to Stone, was made "payable in case of a loss to J. S.," who was a mortgagee of the property insured. J. S. afterwards, with the consent of insurers, assigned all his interest in the policy to the plaintiff; *Held*, that the contract was still between company and original assured, and not between company and payee; and if the policy was void by acts of original assured, plaintiff could not recover. *Hale v. Mechanics Mut. Fire Ins. Co.* 6 Gray, Mass. 169. 1856.

§ 7. A policy made "payable in case of loss to" a mortgagee of the premises insured, is wholly avoided by a subsequent alienation of the insured property, contrary to

the provisions of such policy. Such order does not constitute an assignment of the policy, or convert the contract into an insurance of the mortgagee's interest. *Loring v. Manufacturers' Ins. Co.* 8 Gray, Mass. 28. 1857.

§ 8. Kellogg, who held certain mortgages against one McCarty, assigned them to plaintiff with a guaranty of their payment. A policy was issued to McCarty payable in case of loss to plaintiff. Before the loss McCarty conveyed the premises insured to a third person, and after the loss the mortgages were foreclosed and the mortgage debt in part paid. *Held*, 1st, that the policy was to be treated as an insurance on plaintiff's mortgage interest, and could not be affected by any act of the mortgagor; 2d, that the foreclosure of the loss did not affect the liability of the company, especially as it had not been set up in the answer; and 3d, that the action was not brought for the "immediate benefit" of Kellogg within the meaning of § 399 of Code of New York, and his testimony was competent. *Grosvenor v. Atlantic Fire Ins. Co.* 1 Bosw. N. Y. 469. 1857. Overruled as to 1st point—post, § 9.

§ 9. Where mortgagor took out policy in his own name, "made payable in case of loss to mortgagee," and afterwards sold all his interest in the property; it was *Held*, that the contract was with the mortgagor, and not with the mortgagee; and that the sale of the property divested mortgagor of all insurable interest, and mortgagee could not recover. *Grosvenor v. Atlantic Ins. Co.* 17 N. Y. 391. 1858. Overruling *Traders' Ins. Co. v. Robert*, 9 Wend. N. Y. 404. 1832. *Tillou v. Kingston Mut. Ins. Co.* 1 Seld. N. Y. 405. 1851. 1 Bosw. N. Y. 469. 1857. And reversing on this point 5 Duer, N. Y. 317. 1856.

§ 10. Where a policy, with consent of insurer, has been assigned to a mortgagee of the premises insured; in case of a loss, the assignee can only recover where his assignor could have done so, had no assignment been made.

Such assignment does not convert the policy into a contract of indemnity to the mortgagee; it is the interest of the mortgagor alone, that is covered by it. *State Mutual Fire Ins. Co. v. Roberts*, 31 Penn. St. 438. 1858.

§ 11. Assignee, being mortgagee, takes policy subject to conditions made with assured; and if insured, being mortgagor, breaks conditions after assignment by additional insurance in excess of the amount permitted by the policy, the assignee can not recover. *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.* 17 N. Y. 401. 1858.

§ 12. Mortgagor, with the consent of the insurance company, assigned his policy to the mortgagee. The policy thus assigned, stipulated that "other insurance, without notice and consent of the company, should avoid the policy." Subsequent to the assignment to mortgagee, the mortgagor effected a second insurance, of which no notice was given to the first insurers; *Held*, that the mortgagee was bound for the breach of the terms and conditions of the policy by the mortgagor; and that the second insurance, without notice, avoided the policy. *State Mut. Fire Ins. Co. v. Roberts*, 31 Penn. St. 438. 1858.

§ 13. If the owner of property, which is insured by a policy containing an express provision that the by-laws of the company shall form a part thereof, mortgages the same in violation of one of the by-laws, the policy is defeated; and no right of action thereon remains in favor of one to whom it had previously been assigned with the consent of the company to secure a prior mortgage. *Edes v. Hamilton Mut. Ins. Co.* 3 Allen, Mass. 362. 1862.

§ 14. After an assignment of a policy of insurance with the consent of the insurance company, a non-compliance with the terms of the policy by the assignor, in matters material to the interests of the company, will avoid it as against the assignee. *Pupke v. Resolute Fire Ins. Co.* 17 Wis. 378. 1863.

§ 15. No act of the party insured, after an assignment of the policy with the assent of the insurers, can impair the rights of the assignee. *New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221. 1863.

§ 16. Where it is provided in by-laws which are a part of a contract of insurance, that "when any property shall be alienated, by sale or otherwise, the policy thereupon shall be void," if the insured, after mortgaging the property and assigning the policy with the consent of the insurers, conveys his equity of redemption without such consent, the policy thereupon becomes void. *Lawrence v. Holyoke Ins. Co.* 11 Allen, Mass. 387. 1865.

§ 17. A policy upon a house described therein as "occupied for a dwelling-house, the basement being of stone and wood," becomes void in the hands of a mortgagee to whom it has been assigned, by the use and occupation of the basement of the house, after the assignment and before the loss, as a joiner's shop, although such change of use was unknown to the mortgagee; the charter expressly providing, that "no policy shall extend or be construed to extend" to such and other specified risks, "unless the same are expressly mentioned in the policy, and a proportional premium and deposit paid." *Hoxsie v. Providence Mut. Ins. Co.* 6 R. I. 517. 1860.

See Alienation, § 21, 35, 40, 52, 66. Assignment, 13. Dependency of Policy and Premium Note, 18. Encumbrance, 24. Interest in Policy, 11. Other Insurance, 31, 54.

RESPONSIBILITY OF ASSURED FOR ACTS OF OTHERS.

§ 1. Where assured represented in his application that water casks, in the insured building, were constantly kept full; *Held*, that the negligence of assured's servants in not keeping them full, contrary to assured's order to have them kept full, would not avoid the policy. *Daniels v. Hudson River Fire Ins. Co.* 12 Cush. Mass. 416. 1853.

§ 2. The premises insured were leased before, and sub-leased after, the date of the policy; and the risk was increased by acts of sub-lessees. A by-law provided, that "whenever the risk of any insurance is increased by the act of the assured, the policy shall thereupon be void." *Held*, that assured was not responsible for acts of the sub-lessees, done without his consent or knowledge, and that he was entitled to recover. *Sanford v. Mechanics' Mut. Fire Ins. Co.* 12 Cush. Mass. 541. 1853.

§ 3. Under provision in charter "against alteration by acts of the proprietors;" a tenant is not the proprietor within the meaning of that section; it refers to the insured owner, and it must be his act, one that he does himself, or authorizes to be done, or one which he adopts as his before any loss occurs. *Paddleford v. Providence Mut. Fire Ins. Co.* 3 R. I. 102. 1855.

§ 4. The keeping of straw upon the insured premises, so as to increase the risk, by a tenant of the insured, and without the latter's knowledge or consent, will not avoid the policy. *White v. Mutual Fire Ins. Co.* 8 Gray, Mass. 566. 1857.

§ 5. A stipulation in a policy that if any agent of the company, in the transaction of their business, shall violate the conditions, the violation shall be construed to be the act of the assured and shall avoid the policy, will not render the assured responsible for the mistakes of the agent. *Columbia Ins. Co. v. Cooper*, 50 Penn. St. 331. 1865.

See Alteration, § 5. Burning by Design, 4. Increase of Risk, 20. Negligence, 3. Other Insurance, 85. Use and Occupation, 28, 35, 37, 41, 46, 48, 64. Warranty and Representation, 16.

RETURN PREMIUM.

§ 1. An action for money had and received will not lie to recover the premium of a re-assurance void by statute of 19 George II. C. 37, S. 4. *Andree v. Fletcher*, 2 Term Rep. 161. 3 Term Rep. 266. 1789.

§ 2. Where assured had alienated the insured property, and offered to surrender his policy and take up his deposit note; *Held*, that under the charter of the company, he had the election, without the assent of the company, thus to surrender his policy, and was entitled to that portion of his funds which had not been appropriated for losses and expenses previous to the surrender of the policy. *Sullivan v. Massachusetts Mut. Fire Ins. Co.* 2 Mass. 318. 1807.

§ 3. Where risk never attached, the premium must be returned, if there was no fraud. In this case an action was brought on the policy, with counts for money had and received. There had been renewals, running back many years. The policy was held void, for non-compliance with warranty in original application, to which

all the renewed policies referred. Plaintiff held entitled to all renewals paid by him, within the statute of limitations. *Clark v. Manufacturers' Ins. Co.* 2 Wood. & Miot, C. C. U. S. 472. 1847.

§ 4. If a policy is obtained by fraudulent misrepresentations, and never attached for that reason, no premium is returnable. *Friesmuth v. Agawam Mut. Ins. Co.* 10 Cush. Mass. 587. 1852.

§ 5. If the by-laws of a mutual insurance company provide that policies may be surrendered at any time to be cancelled, and that the insured shall receive the return premium in accordance with a certain table, and, after an injunction has been laid upon the company, the directors, under the authority of the court, have duly cancelled all the outstanding policies, the return premiums due to the policy-holders are just claims against the company, and may be included among the items of liability, in making an assessment upon the deposit notes. *Fayette Mut. Fire Ins. Co. v. Fuller*, 8 Allen, Mass. 27. 1864.

See Countersigning by Agent, § 2, Title 1.

REVIVAL AND SUSPENSION OF POLICY.

§ 1. A corporator of a mutual fire insurance company effected insurance on his individual property, and gave to the company a note for the amount of the premium of insurance. A by-law was subsequently passed by a meeting of the managers, at which he was not present, which provided "that if the interest of any note be in arrear at any time for three months, the policy shall be suspended and

of no effect to make the company liable for loss, until the interest be paid." Upwards of three years after the passage of the by-law, notice of it was given to him by a circular letter, and within thirty days after the notice, his property was destroyed by fire. *Held*, that the company could not, by the passage of a by-law, without consent of the assured, prevent his recovering upon the policy, that the only remedy of the corporation for the non-payment of interest was that given to them by the charter, to wit: the calling in of the entire principal sum of the note; and that they had no power to forfeit his rights under the contract. *Insurance Co. v. Conner*, 17 Penn. St. 136. 1851.

§ 2. Where, contrary to the provisions of the policy, the assured obtained a subsequent insurance without notice or consent of the first insurer; *Held*, that the company had not waived a compliance with such condition, because, long after the obtaining of such second insurance and without any knowledge on the part of the company, that it had been obtained, their treasurer, in issuing his note of assessment, endorsed, in a printed form, a schedule of losses claimed of the company, in which the claim of the assured was included, but with a note appended, showing it as "unadjusted." *Forbes v. Agawam Mut. Fire Ins. Co.*, 9 Cush. Mass. 470. 1852.

§ 3. A policy in a mutual insurance company, issued to the plaintiff, was by its terms to be "suspended," if the assured should neglect for ten days to pay an assessment levied. Nearly fifteen months after the policy was suspended in consequence of non-payment of two assessments, the assured sold the property to another party, and with the consent of the company, assigned the policy to such party, who at the same time executed a mortgage back to plaintiff, and re-assigned the policy to plaintiff, with consent of the company. At the time of this sale and assignment of the policy, the purchaser of the property was not informed of the defect in the policy, by reason of the non-payment of the assessments; *Held*, that the directors of

the company, if they meant to insist on this objection, should have spoken then; but not having informed the purchaser of the fact, they must be understood to have waived it, and could not be permitted to set it up to defeat an insurance, to which the purchaser of the property had innocently trusted till the loss happened. *Hale v. Union Mut. Fire Ins. Co.*, 32 N. H. 295. 1855.

§ 4. Where policy provides that if the insured shall neglect for ten days, when personally called upon, to pay any assessment, the risk of the company on the policy shall be suspended till the same is paid; there can be no recovery for a loss occurring ten days after such assessment has been demanded and left unpaid. The policy is then suspended until such assessment be paid. *Blanchard v. Atlantic Mut. Fire Ins. Co.*, 33 N. H. 9. 1856.

§ 5. Where policy had been suspended by reason of a non-payment of an assessment; *Held*, that the company could not be considered as having waived their right to be exempted from liability for the plaintiff's loss, by their subsequent assessment and collection to cover it. *Nash v. Union Mut. Fire Ins. Co.*, 43 Me. 343. 1857.

§ 6. Where the company has been discharged from liability by want of notice of loss in due time; responsibility for the loss will not re-attach to them, without proving authority in the agent to waive the notice, or a new consideration to sustain it. *Trask v. State Fire & Marine Ins. Co.*, 29 Penn. St. 198. 1858.

§ 7. A policy, void *ab initio* by mis-representation of title, is not rendered valid by an approval, by the directors of the company that issued it, to an assignment thereof of the assured's interest therein; and the assignee cannot maintain action on it, although the title came to him before the loss. *Eastman v. Carroll County Ins. Co.*, 45 Me. 307. 1858.

§ 8. Where a policy had been forfeited by a conveyance of the property insured without the consent of the company, and the alienee, subsequently supposing the policy to be good, assigned it to a mortgagee, and, informing an agent of the company of his purchase, requested consent to the assignment, and the agent wrote across the face of the policy the words "the loss, if any, to be payable to C., mortgagee." *Held*, that the company thereby waived the forfeiture, and continued the policy in force. *Keeler v. Niagara Fire Ins. Co.*, 16 Wis. 523. 1863.

See Agent, § 49. Alienation, 3, 9, 42. Assessments, 45. Camphene, 1. Construction, 20. Dependency of Policy and Premium Note, 1, 2, 3, 8, 9, 16. Parol Contract, 2. Premium Notes, 4, 7. Storing and Keeping, 4. Use and Occupation, 58, 60.

RISK.

§ 1. Condition, that insurers would not be liable for any loss by reason of any invasion, or any military or usurped power. The house was burned by a mob. *Held*, that the loss was not by reason of any usurped power within the meaning of the policy. *Drinkwater v. London Assurance Co.*, 2 Wilson, 363. 1767.

§ 2. The words, "civil commotion," in a policy of insurance against fire, excludes losses happening in consequence of the riots in London in 1780. *Longdale v. Mason*, 2 Marsh. on Insurance, 792. 1780.

§ 3. Insurance "against all losses which defendants should suffer by fire" on stock and utensils in sugar house. By reason of negligence, in building fire without unclosing register on top of chimney, which had as usual been closed the night before, the rooms were filled with sparks

and smoke, and the walls were blistered and the sugar injured by the heat; but there was no actual fire. *Held*, not a loss within the policy. *Austin v. Drewe*, 6 Taunt. 426. (1 E. C. L. 691.) 1816. *Austin v. Drewe*, 4 Camp. N. P. 360.

§ 4. It having been found by verdict of a jury, that a building protected by a policy, had been injured by the falling of the gable of another house, in consequence of fire in that house; *Held*, that the insurers were liable, although the house insured had not been on fire, and the gable of the other house had stood for two days after the fire was extinguished, and fell in the course of operations by order of the Dean of Guild, with the view of taking it down. *Johnston v. West of Scotland Ins. Co.*, 7 Cases in the Court of Sessions, 52. 1828.

§ 5. Where a steamboat was insured against "loss or damage by fire," and an explosion of gunpowder caused the destruction of the boat by burning; *Held*, that as the explosion was caused by fire, the latter was the proximate cause of the loss. *Waters v. Louisville Ins. Co.*, 11 Pet. U. S. 213. 1837.

§ 6. A policy on merchandise agreed to make good to the assured all such loss and damage to the property as should happen by "fire." In the great fire in New York, the store containing the goods insured, was, by order of the mayor, blown up with gunpowder to prevent the spread of the conflagration. At the time this was done, the buildings all around were on fire, and were afterward destroyed, and according to every probability "the fire would have destroyed the store in question, if it had not been blown up." *Held*, that this was a loss by fire, within the meaning of the policy. *City Fire Ins. Co. v. Corlies*, 21 Wend. N. Y. 367. 1839.

§ 7. Where a building insured was torn down to prevent the spread of fire, and partly paid for by order of

the corporation ; *Held*, that the insurer was liable, to the amount of the policy, for the full value of the building, less the amount received from the city, after deducting from such amount a proportionate share of the costs of recovery against the city. *Pentz v. Aetna Ins. Co. of New York*, 9 Paige, N. Y. 568. 1842. Reversing 3 Edw. Ch. N. Y. 341. 1839.

§ 8. Where sugar and molasses, contained in a sugar house and covered by an ordinary fire policy, are destroyed by an explosion of the steam boilers used in manufacturing sugar ; the damage having been produced by the explosion and not by fire, the insurers will not be responsible. *Millaudon v. New Orleans Ins. Co.* 4 La. An. 15. 1849.

§ 9. In order to exempt an insurance company from liability for loss by riot, it is not necessary that the guilt of the rioters should have been first established by a criminal prosecution. *Dupin v. Mutual Ins. Co.* 5 La. An. 482. 1850.

§ 10. Where a house is destroyed by a riotous assemblage, and there is a clause in the policy excepting a loss of that character, the insurance company is not liable for the loss ; and it is in such case immaterial that the rioters originally assembled for a lawful purpose, but afterwards were guilty of riot. *Dupin v. Mutual Ins. Co.* 5 La. An. 482. 1850.

§ 11. "Loss or damage by fire," includes a loss caused partly by an explosion of gunpowder on the premises, and partly by burning. *Scriptur v. Lowell Mut. Ins. Co.*, 10 Cush. Mass. 356. 1852.

§ 12. A policy against fire, provided "that the insurer would not be liable for any loss occasioned by the explosion of a steam boiler;" the fire was caused by an explosion of a steam boiler in the manufactory insured ;

Held, that it was a loss within the excepted peril mentioned in the condition, and could not, therefore, be recovered. *St. John v. American Mut. Marine & Fire Ins. Co.* 1 Duer, N. Y. 371. 1852. Affirmed, 1 Kern. N. Y. 516. 1854.

§ 13. An insurance against fire, effected upon a certain quantity of coal, covers not only the coals deposited at the time, but those deposited since, and covers also the risk arising from the spontaneous combustion of such coal. *British American Ins. Co. v. Joseph*, 9 Lower Canada, Q. B. Appeal Side, 448. 1857.

§ 14. Losses arising from *bona fide* efforts to extinguish fire, such as wetting and soiling of goods, and losses by theft consequent upon their removal, are fairly within the contract of insurance against fire. *Whitehurst v. Fayetteville Mut. Ins. Co.* 6 Jones Law, N. C. 352. 1859.

§ 15. A party setting fire to grass upon his land at an improper and unfitting time, is by that mere fact, responsible for the loss thereby of a threshing machine, which had been brought on his land to thresh his grain. *Hynes v. McFarlan*, 9 Lower Canada, Q. B. Appeal Side, 502. 1860.

§ 16. Assuming the risk of a steam flouring mill, involves the assumption of those things fairly and properly connected with such a business, as part of and appertaining to it, whether newly introduced, or used before the insurance was effected, or not. *Merchants' and Manufacturers' Ins. Co. v. Washington Ins. Co.* 1 Hand. Ohio, 181. 1854.

§ 17. Where plaintiffs effected an insurance upon their stock of "flour, grain, and cooperage, contained in their stone and brick steam flouring mill, with a cement roof, known as the city mills, detached from all other

buildings ;" and it was agreed that "thereafter," none of the following trades should be carried on therein, viz: grist, saw, paper, and other mills, manufactories, or mechanical operations requiring fire-heat, or in which wood chips or shavings are made;" and at the time of the loss the business of "kiln drying corn meal," requiring *fire-heat*, was carried on in the building; *Held*, that as kiln drying corn meal was an incident to a "steam flouring mill," the policy was valid. *Merchants' & Manufacturers' Ins. Co. v. Washington Ins. Co.* 1 Hand. Ohio, 181. 1854.

§ 18. Insurance against fire was effected on goods contained in a store ; one of the walls gave way, and half of the store and the whole of the adjoining building fell ; before there was time to remove the goods, fire broke out in the adjoining building, and communicated with the insured premises ; *Held*, that the insurers were liable for damage from fire, and from water used to extinguish it, to goods not displaced or injured by the fall. *Lewis v. Springfield Fire & Marine Ins. Co.* 10 Gray, Mass. 159. 1857.

§ 19. Where a fire did not occur on the premises insured, but broke out in a contiguous building and caused an explosion of gunpowder, which by the concussion of the air injured the building insured, such injury is not covered by the policy. If, however, the explosion had been occasioned by a fire upon the premises insured, the loss occasioned by the explosion would be within the policy. *Caballero v. Home Mut. Ins. Co.* 15 La. An. 217. 1860.

§ 20. Where, by the terms of the policy, insuring against loss or damage by fire, "on the building occupied as an india rubber factory, and on property contained therein, and on machinery, tools, steam engine, and shafting," it is provided that the company "shall not be liable to make good any loss or damage by fire which shall happen or arise by any explosion ;" and where one of the conditions forming part of the policy also declares, that

"neither will this company be answerable for loss or damage by explosion of any kind," and where the insured premises and property are destroyed, during the life of the policy, by a fire which "originated from, and was caused by an explosion of one of the boilers of the steam engine, belonging to and used in the said india rubber factory, and covered by said policy," the company is not liable for the loss, even though a steam engine was necessary, and ordinarily used in the carrying on of an india rubber factory. *Hayward v. Liverpool & London Fire & Life Ins. Co.* 7 Bosw. N. Y. 385. 1860.

§ 21. If a policy on personal property is endorsed with an agreement for the removal of the property to another building, and for the continuance of the policy in force as to the property after removal, it becomes in effect a new contract between the parties, and a new risk taken by the company. And where some elements of the new risk existed which were forbidden by the original policy, but which were known to the company when the new risk was taken, their existence does not affect the validity of the new insurance. *Rathbone v. City Fire Ins. Co.* 31 Conn. 193. 1862.

§ 22. If merchandise situate in a building containing several store-rooms be insured, and upon the policy there is an uncertainty as to whether it was intended to cover merchandise in all the store-rooms, the insurers will be liable for a loss occurring in any one of them. The language of the policy is the insurers, and must be taken most strongly against them. *Franklin Fire Ins. Co. v. Updegraff*, 43 Penn. St. 350. 1862.

§ 23. A policy of insurance against fire provided that the policy should be void if the premises were used for storing or keeping therein any article included in certain classes of hazards annexed to the policy "except as herein specially provided, or hereafter agreed to by the insurer in writing upon this policy." *Held*, that where the policy

was on a stock of goods insured under the general designation of "groceries," which term included some of these hazardous articles, the insurance by this designation did specially provide for them "in writing upon the policy." *Niagara Fire Ins. Co. v. DeGraff*, 12 Mich. 124. 1863.

§ 24. A policy of insurance against fire covers all loss which necessarily follows from the occurrence of a fire, whenever the injury arises directly or immediately from the peril, or necessarily from incidental and surrounding circumstances, the operation and influence of which could not be avoided. *Brady v. North Western Ins. Co.* 11 Mich. 425. 1863.

§ 25. Spirituous liquors illegally kept for sale may, notwithstanding, be lawfully insured against destruction by fire. The risks insured against are not the consequences of illegal acts, but of accidents. *Niagara Fire Ins. Co. v. DeGraff*, 12 Mich. 124. 1863.

§ 26. Where an insurance company in the City of New York insured the building in that city, known as the Crystal Palace, which, with the public exhibitions that it had been erected for and to which for a number of years it had been exclusively devoted, were matters of great public notoriety and interest; and it was described in the policy as the building lately owned by the Association for the Exhibition of the Industry of all nations; and the defendants also insured certain property in the building as "belonging to exhibitors;" *Held*, that they must be deemed to have been acquainted with the business to which the building was appropriated, the nature of the objects exhibited, and the means employed to exhibit them, and have intended to include in the risk such business and the employment of all such usual means; and that the use of fire and steam for the purpose of the exhibition of machinery, and the keeping of a restaurant, with liquors and cigars, and a kitchen with ovens, were all to

be deemed parts of the exhibition, and did not defeat the insurance. *Mayor, &c. of N. Y. v. Hamilton Fire Ins. Co.* 10 Bosw. N. Y. 537. 1863.

§ 27. A policy of insurance upon goods "contained in the third story of a four-story building," over two specified numbers of a certain street, will cover such goods after their removal into another room subsequently hired and occupied by the insured in the same story of the same building; although the policy provides that it shall be void if the property insured shall be removed without necessity, to any other place. *West v. Old Colony Ins. Co.* 9 Allen, Mass. 316. 1864.

§ 28. Where the property described in a policy, and the purposes to which it is dedicated, sufficiently indicate the character and nature of the articles to be kept there, and the business to be transacted, and the nature and extent of the risk must have been known to the insurers to embrace articles and pursuits specified as hazardous, extra-hazardous, and special hazards, the carrying on of a business, in the building, denominated hazardous or extra-hazardous, or specified in the memorandum of special rates, without permission of the insurers, will not vitiate the policy. *Mayor, &c. of N. Y. v. Brooklyn Fire Ins. Co.* 41 Barb. N. Y. 231. 1864.

§ 29. A policy insuring premises against "such loss or damage as should or might be occasioned by fire to the property therein mentioned," does not cover damage resulting from the disturbance of the atmosphere by the explosion of a gunpowder magazine a mile distant from the premises insured. The words "loss or damage by fire" are to be construed as ordinary people would construe them. *Everett v. London Assurance*, 19 Com. Bench, N. S. 126. (115 Eng. C. L.) 1865.

§ 30. Where a policy on a theatre contained a clause that the insurers should not be liable on account of any

loss by a fire originating in the theatre proper, and a brick wall of the building became so heated from without as to set fire to the wood work within the theatre; *Held*, that this was not a fire originating in the theatre proper, within the meaning of the policy, and that the insurers were liable. *Sohier v. Norwich Fire Ins. Co.* 11 Allen, Mass. 336. 1865.

§ 31. Where a policy excepts "loss by fire occasioned by mobs or riots," the exception clause does not extend to a loss by fire occasioned proximately by the burning of an adjoining bridge by order of the military authorities to prevent the advance of an armed force of the public enemy. *Harris v. York Mut. Ins. Co.* 50 Penn. St. 341. 1865.

§ 32. Where a policy issued to a druggist insured him against loss or damage by fire, on his stock of drugs, chemicals and other merchandise, "hazardous and extra-hazardous." *Held*, that the policy covered a fire occasioned by the insured putting upon a stove on the premises about five gallons of an inflammable ointment, for the purpose of warming it; it being usual for druggists to mix and melt ointments in that manner. *Brown v. Kings County Fire Ins. Co.* 31 How. N. Y. 508. 1865.

§ 33. A policy of insurance upon a building is an insurance upon the building as such, and not upon the materials of which it is composed. If, from any defect of construction or overloading, the building fall into ruins, and subsequently the materials take fire, the insurer is not liable for the loss. *Nave v. Home Mut. Ins. Co.* 37 Mo. 431. 1866.

§ 34. The term "merchandise" in a policy of insurance against loss, &c., by fire on grain and other merchandise in each of two warehouses, which were kept by the assured, who were grain merchants, for the purpose of

receiving and storing grain, does not include a platform scale, bedded in the floor of one of the warehouses, nor belting, nor a corn sheller, nor a beam scale, which things had been dispensed with in the business, but which had not been offered for sale; nor tools, implements, or articles of property purchased for use in the warehouses, as being necessary or convenient in the business, and which were used as occasion required. *Kent v. Liverpool & London Ins. Co.* 26 Ind. 294. 1866.

§ 35. A policy provided that the insurers would not be liable for loss or damage by explosion, "except for such loss or damage as shall arise from explosion by gas." In the insured premises, which were used for the business of extracting oil, an inflammable and explosive vapor evolved in the process, escaped and caught fire, setting fire to other things; it afterwards exploded and caused a further fire besides doing damage by the explosion. *Held*, that "gas" in the policy meant ordinary illuminating gas; that the exemption of liability for loss by explosion was not limited to cases where the fire was originated by the explosion, but included cases where the explosion occurred during a fire, and that the insurers were not liable either for the damage from the explosion nor for that from the further fire caused by the explosion. *Stanley v. Western Ins. Co.* Law Rep. 3 Ex. 71. 1868.

See General Average, Lightning, Negligence, Theft. Also, Questions for Court and Jury, §. 14, 20, 21. Removal, 1, 2, 3. Renewal of Policy, 3. What Property is Covered by Policy, 34.

SET-OFF.

§ 1. Where an agent effects insurance on account of his principal, and the policy contains a clause, that in the event of loss, payment is to be made to the agent; the promise must be understood to be made in his representative character, and not in his own right. The company cannot, therefore, set off a debt due from the agent to them, against the amount due from them by virtue of such policy. *Braden v. Louisiana State Ins. Co.* 1 La. 220. 1830.

§ 2. A receiver should allow off-set of liquidated debt due to the corporation, against unliquidated debt due from them. In equity, the off-set extends to all mutual credits, arising *ex-contractu*, between original parties. *Holbrook v. American Fire Ins. Co.* 6 Paige, N. Y. 220. 1836.

§ 3. An insurance company loaned money on a bond and mortgage, and at the same time insured the building subject to the mortgage. In the great fire in New York, the building was destroyed and the company rendered insolvent; *Held*, that the assured might set off the amount of his loss under the policy, against the bond and mortgage. *Receivers of Globe Ins. Co.* 2 Edwards, N. Y. Ch. 625. 1836.

§ 4. In the great fire of 1845 at Pittsburgh, the losses exceeded the entire funds of the Alleghany County Mutual Insurance Company, including the one per cent. assessed on the amount insured after the exhaustion of all the premium notes. The assured had removed his goods from apprehension of fire, and suffered damage to the amount of \$100, and in action against him by the company

for the recovery of balance of his premium note, \$152, and 1 per cent. on property insured, \$32, or total of \$184, he contended for a set off of the \$100 damage sustained by himself; *Held*, that where the funds of the company are not adequate to pay all the losses occasioned by an extensive fire, the entire funds of the company belong to the losers *pro rata*; and such set-off could not be allowed, as assured would thereby receive more than the other losers. *Hillier v. Alleghany Co. Mut. Ins. Co.* 3 Penn. St. 470. 1846.

§ 5. Where a premium note in advance had been given to a mutual insurance company, and the maker afterwards effected insurances with the company, for the premiums on which he stood a debtor on their books when the company failed; *Held*, that on paying such premiums, he was entitled to have the same amount deducted from the premium note in suit, and the recovery would be for the balance of the note. *Merchants' Mut. Ins. Co. v. Leeds*, 1 Sandf. N. Y. 183. 1847.

§ 6. Where A. was liable to the company for unpaid installments on his stock notes or shares, and the company became insolvent, and A. purchased from a stranger an unpaid balance due on a policy of insurance by the company; *Held*, that he could not set off any more of such claim against the company, than the *pro rata* dividend of the assets of the company upon losses. *Long v. Pennsylvania Ins. Co.* 6 Penn. St. 421. 1847.

§ 7. Where loss has been sustained, and there has been a vote to pay, the company may be garnisheed; but may set off all sums assessed on premium note, and his just proportion of losses up to the time of service of process. *Swamscot Machine Co. v. Partridge*, 5 Fost. N. H. 369. 1852.

§ 8. In an action upon a premium note by a receiver, any set-off of the maker, which could have been pleaded

against the company, is good as against the receiver, although the note did not mature until after the receiver was appointed. *Berry v. Brett*, 6 Bosw. N. Y. 627. 1860.

§ 9. A premium note made by defendant was illegally transferred to the plaintiff. The defendant had claims against the company. *Held*, that defendant, being one of the creditors of the company, might contest the legality of the transfer, and thus throw the note back into the hands of the company, in order to avail himself of the existing equities between them. *Litchfield v. Dyer*, 46 Me. 31. 1858.

§ 10. A member of the General Mutual Insurance Company in New York, during the term of his policies, sustained several losses, which were adjusted but not paid by the company. Subsequently, he surrendered his policies, and had endorsed on the back of each the following: "It is agreed to return premium of——— allowed under this policy, to be paid ratably out of the assets of the company when divided. This policy is hereby canceled from——— 1854." *Held*, that under the charter of this company, each dealer was a corporator, and interested in all the premiums paid by others; that each dealer was interested in the earned premiums of every other dealer, and the corporators were mutual guarantors of each other; and that under this charter each member must pay what he owed the corporation, and each would be entitled to his *pro rata* dividend of the assets—and that he could not, therefore, set off his losses or any of them against his premium notes, either in hands of the company or its receiver, but according to the terms of his agreement endorsed on the policies, must pay his notes in full, and receive his *pro rata* proportion of the assets, with other members. *Lawrence v. Nelson*, 4 Bosw. N. Y. 240. 1859. Affirmed, 21 N. Y. 158. 1860. See also, *Lawrence v. McCready*, 6 Bosw. N. Y. 329. 1860.

See Garnishment or Trustee Process, § 3, 4. Insolvency, 3. Interest in Policy, 2. Premium Notes in Advance, 1.

STOCK NOTES AND SUBSCRIPTIONS.

§ 1. The defendant, who was a director in the Mohawk Insurance Company, subscribed for 1042 shares of capital stock, and gave his note to the company for \$20,840, the amount thereof. The majority of the stock was subscribed for by the other directors in the same way. After doing business for two years, the company being unfortunate and the other directors becoming insolvent, the defendant negotiated a sale of his shares to the president of the company, who was insolvent, and a transfer of the shares was entered on the books of the company, and the president's note was substituted in lieu of the note of defendant. Six thousand dollars was paid to the president as consideration for this favor. No official sanction to this proceeding was given by the directory. Afterwards, on application of the creditors, a receiver was appointed, who brought suit against defendant. *Held*, that the transaction between defendant and the president was a fraud on the creditors, and judgment was rendered against defendant for the amount of his original note and interest, less the sum of \$4,500, which the president had paid in to the company on his substituted note, out of the \$6,000 consideration which he received from defendant. *Nathan v. Whitlock*, 3 Edw. Ch. N. Y. 215. 1838.

§ 2. In an action on a stock note, where payment was promised according to assessment by order of the directory; *Held*, that whether the exigencies of the company required an assessment, was a matter of discretion for the directory; and could not be inquired into in the case. *Judale v. American Live Stock Ins. Co.* 4 Ind. 333. 1853.

§ 3. Whether the subscription was taken by one authorized by the directors so to do, after they have con

firmed the act, is immaterial; and so, whether a per centage was paid down, as required by the terms of subscription, is immaterial, and does not affect the validity of the subscription or note. *Judale v. American Live Stock Ins. Co.* 4 Ind. 333. 1853.

§ 4. The charter act provided that certain commissioners named, or a majority of them, as soon as a certain number of shares should be subscribed, should call a meeting of stockholders for organization; *Held*, that this provision was directory; and that, provided the stockholders did meet and organize, it was immaterial whether the meeting was in pursuance of a call by said commissioners or otherwise; and that such a failure to follow the charter constituted no defense to an action on the subscription note. *Judale v. American Live Stock Ins. Co.* 4 Ind. 333. 1853.

§ 5. Notwithstanding refusal to renew stock note and forfeiture thereby of stock, the maker is liable for his proportion of losses upon risks taken antecedent to such refusal, under the 2d section of the act of 1813, ch. 55, (charter of Co.) in Maryland. *Murphy v. Patapsco Ins. Co.* 6 Md. 99. 1854.

§ 6. The charter declared that the capital stock should be actually paid in, before it shall be lawful for the said company to commence the business of insurance; and the company is authorized to invest its capital in public stock, bonds and mortgages, and such other securities as the directors may approve. It appeared that the whole capital was securely invested, that the subscription to the stock was made in good faith, that the company went on and issued policies upon the faith of this capital; *Held*, that individuals, who gave their obligations to constitute this capital, could not repudiate them on the ground that the stock had not been subscribed and paid in. The securities are not void because, instead of going through the formality of receiving the money, and then paying it back and

taking securities, the directors took the securities without this ceremony. One stockholder in a company, because he has an unsettled account with them, or any other matter of dispute, has no right to bring a company into this court to settle all their accounts as a company. When the complainant does equity, and pays up the installments already assessed, and the costs of the suit at law, the court will protect him against any assessment not based upon other stockholders. *Yard v. Pacific Mut. Ins. Co.* 2 Stockton, Ch. N. J. 480. 1856.

§ 7. A subscription of \$1,000 was given to make up the capital stock of a company, "on condition that it should not be operative until \$300,000 had been subscribed," and company commenced operating before such amount was subscribed; *Held*, that an action on defendant's subscription would not lie. *Berry v. Yates*, 24 Barb. N. Y. 199. 1857.

§ 8. A bill was brought by creditors of Knox Assurance Company against said company, and thirty-seven subscribers to the capital stock of the company; alleging that the creditors had obtained judgments against the company upon which execution had been issued with return of "no property;" and praying relief against the subscribers to the extent of the balance remaining unpaid on their subscriptions. Default, and a decree thereupon, were entered against the company. The subscribers defended on the ground that they were induced to subscribe, and to give their bonds and other securities for the amount of their subscriptions, by false and fraudulent representations of the agent of the company, touching its situation. On the trial it appeared that the subscribers paid ten per cent. of their subscriptions, and, after having had full opportunity to know the situation of the company, organized a branch of the corporation; and that it was not till after a succession of losses, and "after taking time to consider what was best to be done," that they concluded to consider themselves defrauded. *Held*, that this defense

came too late; and that decrees should be entered against the subscribers severally, for the arrears on their shares of capital stock. *Ogilvie v. Knox Ins. Co.* 22 How. U. S. 380. 1859.

§ 9. Under the charter of the Ohio Insurance Company, which provides that the directors "shall have power to increase the stock of said company to \$200,000, on such terms and conditions, and in such manner as to them shall seem best," the existing stockholders have no exclusive right to take the increased stock in amounts proportionate to the several amounts of the original stock held by them. *Ohio Ins. Co. v. Nunnemacher*, 15 Ind. 294. 1860.

§ 10. An individual taking a policy of insurance and giving his promissory note to the company for the premium, cannot be made a stockholder and liable for the full amount of the note, when he neither knows that he is assuming any such obligation, nor intends to assume it. Under such circumstances his note cannot be treated as a stock note and collectable without a previous assessment. *Dana v. Munro*, 38 Barb. N. Y. 528. 1860.

§ 11. Premium notes taken by a mutual insurance company upon policies already issued, and payable not at the end of or within twelve months from date, but in such portions and at such times as the directors shall require, are not sufficient to constitute a basis of capital for the renewal or extension of the corporation under the New York statute of 1849. *The People v. Rensselaer Ins. Co.* 38 Barb. N. Y. 323. 1862.

§ 12. In New York an action may be commenced on a note given to form the capital stock of a mutual insurance company without any actual request, or demand of payment, at the expiration of twelve months, or twelve months and three days, from its date; and the statute of

limitations will then commence running on the same. *Sands v. St. John*, 36 Barb. N. Y. 628. 1862.

§ 13. A premium note was executed by a policy holder to a mutual insurance company, promising to pay the sum therein named, "in such portions and at such time or times as the directors of said company may, agreeably to their charter and by-laws, require." By the charter the premium notes and cash premiums composed the capital stock, and this capital was declared liable for losses and expenses. *Held*, that the company could not recover on the notes for an assessment made thereon, without alleging and proving that losses and expenses had actually occurred. *American Ins. Co. v. Schmidt*, 19 Iowa, 502. 1865.

§ 14. A note given an insurance company organized under the general act of 1849 of New York, and forming a part of the original capital of such company, is payable absolutely without alleging or proving any loss or assessment by the company. *Tuckerman v. Brown*, 33 N. Y. 297. 1865.

See Premium Notes in Advance. Also Assessment, § 41, 56, 61. Mutual Companies and Members of, 5. Premium Notes, 43.

STORING OR KEEPING.

§ 1. Policy on building "where no fire is kept and no hazardous goods deposited." A tar barrel (which was "hazardous,") was introduced, and from it, the building caught fire. *Held*, that the stipulations referred to the habitual use of fire, and the ordinary deposit of goods, not to the occasional introduction of either. *Dobson v. Sotheby*, 1 Moody & M. 90. (22 E. C. L. 481.) 1827.

§ 2. The keeping of boards and other timber, in a building insured, will not avoid the policy, if they are not among the articles prohibited from being kept upon the premises, in the classes of hazards. *Lounsbury v. Protection Ins. Co.* 8 Conn. 459. 1831.

§ 3. Where policy prohibited an appropriation of the building for the purpose of "storing" certain enumerated articles, among which were "oils and spirituous liquors;" *Held*, that the keeping of those articles in the cellar in casks, &c., to replenish the smaller vessels in the store for the purposes of retailing, was not "storing;" that the "storing" meant in the condition was a keeping for safe custody, to be delivered out in the same condition, substantially the same as when received; and applied only where storing or safe keeping was the principal object of the deposit, and not where it was merely incidental. *New York Equitable Ins. Co. v. Langdon*, 6 Wend. N. Y. 623. 1831. *Affirming* 1 Hall, N. Y. 226. 1828.

§ 4. Policy provided "that, if the building should be appropriated, applied, or used to or for the purpose of keeping or storing therein extra-hazardous articles, then, and so long as the building should be so used, the policy should cease and be of no further effect." During existence of the policy, this clause had been violated by storing and using the building otherwise than permitted, but it was not so used at time of the fire. *Held*, that the policy was good. *Lounsbury v. Protection Ins. Co.* 8 Conn. 459. 1831.

§ 5. The keeping of "liquors" in a boarding house, for sale to boarders, does not avoid the policy, under the condition prohibiting the "storing therein of extra-hazardous articles," among which are included "spirituous liquors." *Rafferty v. New Brunswick Fire Ins. Co.* 3 Harrison, N. J. 480. 1842.

§ 6. A policy on stock of "dry goods," with "cotton in bales" enumerated in the class of extra-hazardous articles, will not be vitiated by the fact that part of the stock consists of "cotton in bales," unless the jury should find that the risk was thereby increased. *Moore v. Protection Ins. Co.* 29 Me. 97. 1848.

§ 7. Policy on stock of merchandise contained the usual clause against an appropriation or use of the building for the purpose of storing or keeping therein any of the articles enumerated in classes of hazards. The assured kept some hazardous articles, required by the ordinary course of his trade. *Held*, that it did not violate the policy, as the above provision was intended merely as a protection against the appropriation of the building for the business of storing and keeping such articles. *Moore v. Protection Ins. Co.* 29 Me. 97. 1848.

§ 8. Policy contained the usual clause against an appropriation or use of the premises for the purpose of carrying on therein any trade, &c., or for the purpose of keeping or storing therein any of the articles enumerated in the classes of hazards, &c. Among the trades and articles included in classes of hazards, were those of "houses building or repairing," and "oil, turpentine and paint." At the time of the fire the house was being repaired and painted; and "oil, turpentine and paint" were in the building for that purpose; *Held*, that the repairing of the house insured, and the deposit of the oil, turpentine and paint for that purpose, were not the trade of "houses repairing," or "storing" of the articles, within the meaning of the condition. *O'Neill v. Buffalo Fire Ins. Co.* 3 Comst. N. Y. 122. 1849.

§ 9. Policy was on "stock in trade, consisting of merchandise not hazardous." Among the classes of extra hazards were enumerated "oil, tallow and glass;" and, it appearing that these articles were kept with the stock insured, the policy was held to be void. *Richards v. Protection Ins. Co.* 30 Me. 273. 1849.

§ 10. Building had been used for dressing flax; but, before fire and before insurance, the machinery had been removed and building made to conform to application and description in the policy; but some unbroken flax in bulk was left in one corner of the room, and was there at time of the fire. One of the conditions was "that if the buildings should be appropriated, applied or used, to or for, the purpose of keeping or storing therein any of the articles denominated hazardous, extra hazardous, or enumerated in the memorandum of special hazards," &c., the policy should be void; and among such articles, denominated hazardous, "flax" was included. The court instructed the jury, "that if they were satisfied from the evidence that the building was appropriated, applied or used for the purpose of keeping or storing flax, the policy was void. But if the building was not devoted to, or used for, that purpose, and the small pile of flax was there but temporarily, and with no intention of having it regularly stored or kept there, then the policy would not be avoided." *Hynds v. Schenectady County Mut. Ins. Co.* 16 Barb. N. Y. 119. 1852. Affirmed, 1 Kern. N. Y. 554. 1854.

§ 11. Policy covered "stock of goods and merchandise," and stipulated "that if the premises be appropriated, applied or used for the purpose of storing or keeping therein any of the articles enumerated in the classes of hazards without consent, then and so long as they shall be so appropriated, applied or used, this policy shall cease and be of no force or effect." Among the articles thus referred to, "oil and cotton" were included. The assured had kept, for a short time, in the back part of the store, a barrel of oil, with bunches of cotton near it; *Held*, that the clause by its terms was confined to the case of a building insured; and, in reference to that, forbid the appropriation or chief use of the building for any of the forbidden purposes; and not the incidental keeping of small quantities of the forbidden articles, for retail, along with a general stock of goods. *Leggett v. Ætna Ins. Co.* 10 Rich. Law, S. C. 202. 1856.

§ 12. Policy of insurance was on a stock in trade, described in the application (which was made part of the policy and warranty on the part of assured) as consisting of "dry goods, groceries, hardware, crockery, glass, and wooden ware, britannia and tin ware, stoves of various kinds, and various other wares and merchandise." The conditions were also annexed and referred to as forming part of the policy, and "were to be used and resorted to, in order to explain the rights and obligations of the parties in all cases not herein specially provided for. One of the conditions was, "that if the premises be used for the purpose of storing or keeping therein any of the articles denominated hazardous, extra hazardous, &c., the policy shall be void." Among the articles thus referred to were several mentioned in assured's application, and also "groceries with any hazardous articles, rags, &c." It appeared that "rags" had been kept as part of the stock in trade; and that it was usual for shopkeepers, having a general stock like that insured, to keep "rags" in the same manner. *Held*, that the keeping of them avoided the policy, under the above conditions; and also held, that the effect of evidence to prove such an usage in country stores was to control the written agreement of the parties, and was therefore incompetent. *Macomber v. Howard Fire Ins. Co.* 7 Gray, Mass. 257. 1856.

§ 13. Policy provided "that if the building should be appropriated, applied or used, to or for the purpose of keeping or storing therein any of the articles enumerated in the classes of hazards, then and thenceforth the policy should cease, and be of no force or effect." Among the classes of hazards referred to, "spirituous liquors" were enumerated, and it appeared that a quantity of liquors had been put in one room of the building, and kept there for two months before the fire, and were there at time of fire for the purpose of safe keeping, and selling by the package when opportunity offered. *Held*, that if from the evidence the jury believed that the building had been appropriated, applied or used, to or for the purpose of storing

or keeping liquors therein, then the plaintiff could not recover; but if they found it was not so appropriated, applied or used, then they must find for the plaintiff. *Longhurst v. Conway Fire Ins. Co.*, U. S. D. Ct. Northern Division, Iowa, October Term, 1861.

§ 14. The policy contained a stipulation against keeping on the premises any "hazardous" or "extra hazardous" articles, on penalty of forfeiture of the insurance. Oil, sulphur and matches, were mentioned as "hazardous" and "extra hazardous" articles, and were kept on the premises. *Held*, that the policy was made void; and that the fact that the property was insured "as a provision and grocery store" did not authorize the keeping of the excepted articles as part of the stock appertaining to such business. *Whitemarsh v. Charter Oak Fire Ins. Co.*, 2 Allen, Mass. 581. 1861.

§ 15. A policy of insurance on the machinery in a silk factory, which provides that it shall be of no effect while the premises shall be used for storing "cotton in bales," "rags," or "wool," or for a "cotton mill," "woolen mill," or other "manufacturing establishment or trade requiring the use of heat," is not avoided by using one room for weaving a few pieces of stuff from woolen and linen thread and cotton, spun elsewhere and kept in the room. *Vogel v. People's Mut. Fire Ins. Co.* 9 Gray, Mass. 23. 1857.

§ 16. The written portion of a policy of insurance described the property insured as follows: "On a stock of goods consisting of a general assortment of dry goods, groceries, crockery, boots and shoes, and such goods as are usually kept in a general retail store." The policy also contained printed conditions of insurance, and it was thereby stipulated that if the premises should be used for the purpose of storing therein any of the goods, &c., denominated "hazardous," "extra hazardous," or included in the memoran-

dum of "special hazards," except in the policy specially provided for, or afterwards agreed to by the company in writing, the policy should be void. The policy also gave printed classes of hazards, arranged under the heads of "not hazardous," "hazardous," "extra hazardous," and "memorandums of special hazards," among which latter was the following: "Gunpowder, phosphorus and salt-petre, are expressly prohibited from being deposited, stored or kept in any building insured, or containing any goods &c., insured by this policy, unless by special consent in writing on the policy." In an action upon the policy it was proved that at the time of effecting the insurance, the insured had among his goods, and kept in his store for sale a small amount of gunpowder, about twenty pounds, and that gunpowder is an article that is ordinarily and usually kept in a general retail store, in quantities varying from ten to fifty pounds. *Held*, that keeping an article in a store for retail purposes is not storing such article within the meaning of the words of the policy; that the written portion of the policy should control the printed stipulations and conditions, when there is any want of harmony between them. That the written words in this policy are broad enough to include any articles that are usually dealt in by persons keeping a general retail store, and all such articles are included in the policy, as if each was enumerated at length; and that the policy was binding. *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492. 1861.

§ 17. If by the terms of a policy of insurance, the keeping or storing of certain articles in the insured premises is prohibited during its continuance, and the policy only suspended while they are so kept, the policy is not rendered void because such articles were, at times, kept in the insured premises. *Phoenix Ins. Co. v. Lawrence*, 4 Metc. Ky. 9. 1862.

§ 18. The keeping of articles to be exhibited or to be used as means and instruments of a public exhibition, is not a use of the building "for the purpose of storing

or keeping therein " such articles, within a clause in the policy relating to hazardous articles. *Mayor, &c. of New York v. Hamilton Ins. Co.* 10 Bosw. N. Y. 537. 1863.

§ 19. Where a policy of insurance on a patent leather manufactory allowed keeping benzole in no place but in a shed detached from the building, the fact that the insured, in conducting their business, used benzole and carried it as needed into the factory, in an open can, is not a breach of the conditions of the insurance. Benzole being ordinarily used in such manufactory, the presumption is that it was intended that it might be used as it is ordinarily in similar factories. *Citizens Ins. Co. v. McLaughlin*, 53 Penn. St. 485. 1866.

See Gunpowder, Increase of Risk, § 26. Use and Occupation, 4.

SUBROGATION.

§ 1. Policy on house, which was destroyed by rioters. The insurance office paid the loss, and an action was brought, in the name of insured, for the benefit of the insurance office, against the hundred for damages. Action sustained. *Mason v. Sainsbury*, 3 Doug. 61. (26 E. C. L. 167.) 1782.

§ 2. In a like case, where the action was brought by the insurance office in its own name, judgment was by a divided court for defendant. *London Assurance Co. v. Sainsbury*, 3 Doug. 245. (26 E. C. L. 167.) 1763. This judgment was unanimously affirmed in Court of Exchequer Chamber. See memorandum at the end of the above case.

§ 3. Policy on 1,027 bales of cotton, "for whom it may concern," stored in New Orleans, provided that "a prior insurance, not notified and expressed in the policy,

should render it void. Before the taking out of this policy, 333 bales of the same cotton had been insured for £2,000, by the Alliance Marine Insurance Company in London, and upon due notice and proof of loss, the latter paid up the amount of its policy, and brought suit against defendant to recover the amount thus paid. *Held*, that the owners of the 333 bales could not have recovered from the defendant more than the amount of loss not covered by the assurers in London, because of the non-compliance with the above condition; and that the plaintiffs could not therefore justly claim to be subrogated to rights and claims which the owners themselves had not acquired. *Alliance Marine Assurance Co. v. Louisiana State Ins. Co.* 8 La. 1. 1835.

§ 4. If, after insurance, the insured sell the property to another party, he can only recover to the amount of the purchase money unpaid at the time of the fire, and upon payment of his claim by the underwriters, the latter will be entitled to all the securities held by the assured, as against the vendee. *Aetna Fire Ins. Co. v. Tyler*, 16 Wend. N. Y. 385. 1836.

§ 5. Where insured mortgaged the insured premises, and assigned the policy with the consent of the company to the mortgagee, and then sold the insured property to a third party, subject to the mortgage, and the property was afterwards destroyed; *Held*, that mortgagor had been divested of all interest, and mortgagee could not recover without assigning to the insurance company an interest in the mortgage equal to the amount to be paid by them. *Kip v. Receivers of Mutual Fire Ins. Co.*, 4 Edw. Ch. N. Y. 86. 1842.

§ 6. An insurance company having paid a loss on a dwelling-house, caused by sparks from a locomotive, and for which loss the railroad company was liable; *Held*, that assured might in the first place apply to either the

railroad company or the insurance company; that if he first applied to the railroad company, this claim on the insurance company would be diminished by the amount received from the former; that if he first obtained indemnity for his loss from the insurance company, the latter was subrogated to his rights as against the railroad company, and might bring an action at law in his name against it, and he could not, by the execution of any release, discharge the railroad company from their liability. *Hart v. Western R. R.* 13 Met. Mass. 99. 1847.

§ 7. A mortgagee, who gets an insurance for himself, when the insurance is upon the property generally, without limiting it in terms to his interest as mortgagee, but when, in point of fact, his only insurable interest is that of a mortgagee, in case of loss by fire before the payment of the debt and discharge of the mortgage, has a right to recover the amount of the loss for his own use, and without assigning the debt to the insurers. *King v. State Mut. Fire Ins. Co.* 7 Cush. Mass. 1. 1851.

§ 8. Policy on a church, which took fire from sparks from a steamboat, having no grille on the chimney. The company paid the loss and took from the curé and one of the *Marguilliers en charge* a transfer of the claim against the owners of the boat, and brought an action against the owners in their own name. *Held*, 1st, that the proper officers of the church had cause of action against the owners of the boat; 2d, that, though there was no legal assignment of the claim, this was a valid act of subrogation, and the company might bring the action. *Quebec Fire Assurance Co. v. St. Louis*, 7 Moore, P. C. 286. 1851. *Same v. Same*, 1 Lower Canada, 222.

§ 9. Where property insured has been maliciously and willfully burnt by a third person; no action can be sustained by the insurance company, which had paid the loss against such third person, in its own name; and the statute inflicting against the incendiary a penalty of three

times the loss in favor of the party injured, will not give such right of action. *Rockingham Mut. Fire Ins. Co. v. Boshier*, 39 Me. 253. 1855.

§ 10. When a party, holding a lien upon real estate to secure a debt, effects an insurance upon such property to secure the debt; in case of a loss the insurance company, on paying the insurance, will be entitled to the benefit of the security held, to the amount they have paid; and if they pay the insured the whole amount of his claim for which he holds such security, they will have a right to the whole of the security held by him. If the insured holds other securities for the same debt, on paying to him his whole claim, the insurer will be entitled to all the securities. *Sussex County Mut. Ins. Co. v. Wookruff*, 2 Dutch. N. J. 541. 1856.

§ 11. A mortgagee of premises insured, foreclosed and became the absolute owner. He then agreed to sell to a third party and keep the premises insured, upon agreement of vendee to pay him the premiums which he might pay for continuing the insurance. The insurers had notice of all these facts, and consented that the policy should remain good to the vendor until the title was perfected in the vendee. *Held*, that on paying a loss to the vendor, happening subsequently, and before title had been perfected in the vendee, the assurers were not entitled to be subrogated to the claim of assured against his vendee. Assured is entitled to recover to the amount of the policy, and the indemnity enures to the benefit of his vendee as well as himself. *Benjamin v. Saratoga County Mut. Ins. Co.*, 17 N. Y. 415. 1858.

§ 12. Where agreement is made between mortgagee and mortgagor, that premises shall be insured in name of the mortgagee, but mortgagor to pay the premiums, and a policy is taken out in the name of the mortgagee accordingly; the insurance company are not entitled to subrogation, although the assurers were not informed, at the time

of insurance, of any such agreement, and the policy was to plaintiff "as mortgagee;" and such agreement may be by parol. *Kernochan v. New York Bowery Fire Ins. Co.*, 17 N. Y. 428. 1858. See also, *Bradford v. Greenwich Ins. Co.* 8 Abb. N. Y. 261. 1859.

§ 13. If the interest of a mortgagee in possession has been insured *eo nomine*, at his own expense, the insurers, in case of a loss by fire before the mortgage debt is paid, cannot, upon an offer to pay the loss and the amount due on the mortgage above the loss, maintain a bill in equity to have the mortgage assigned to them, and to be subrogated to the rights and remedies of the insured under the mortgage. *Suffolk Fire Ins. Co. v. Boyden*, 9 Allen, Mass. 123. 1864.

§ 14. Where insured property has been burned by the carelessness of a railway company, and the insurance company has paid the loss, it cannot maintain an action in its own name against the railway company. The suit must be brought in the name of the owner of the property for the use of the insurer. The different rule applied in cases of marine insurance rests upon the doctrine of abandonment, and subrogation of the insurer to the rights and title of the insured; a doctrine which has no existence in cases of fire insurance. *Peoria Marine & Fire Ins. Co. v. Frost*, 37 Ill. 333. 1865.

See Alienation, § 51. Damages Beyond Actual Loss, 1, 5.

SUCCESSIVE LOSSES.

§ 1. Where policy provided "that the insurers shall not be liable for more than the sum insured in any case whatever," and there were two distinct risks of \$1,000 on one building, and \$500 on another, and a loss of \$142 had been previously paid upon the first building, which was afterwards totally destroyed; *Held*, that said \$142 must be deducted from the \$1,000, and that the remainder

(\$858) only, could be recovered. *Curry v. Commonwealth Ins. Co.* 10 Pick. Mass. 535. 1830.

§ 2. Where insured property is destroyed by fire to a greater amount than all the deposit notes and one per cent. on all the property insured, and the whole amount of the notes and the one per cent. was assessed to meet it, and afterwards another loss occurred; *Held*, that the entire proceeds of the notes and the one per cent. must be applied toward the payment of the first loss. *Coston v. Alleghany County Mut. Ins. Co.* 1 Penn. St. 322. 1845..

§ 3. Where policy in a mutual company stipulated that defendants "would make good all loss and damage by fire to the premises, during the term of seven years, not exceeding the amount insured;" and that in case of loss they might "repair or replace within a reasonable term;" and the buildings were once destroyed, and rebuilt by the company at a cost less than amount insured by \$550, and were afterwards destroyed again within the time of insurance, and without any change having been made either in the policy or premium notes; *Held*, that the company were liable to assured for the remaining difference of \$550. *Trull v. Roxbury Mut. Ins. Co.* 3 Cush. Mass. 263. 1849.

§ 4. Where a by-law of a mutual company, to which policy was made subject, provided "that the greatest sum that could be taken in any one risk was \$5,000;" and another, that "not more than half the value of the goods, wares or merchandise should be insured;" and another, "that partial losses shall be paid in full, not exceeding amount insured;" and assured first lost \$551, which was paid and endorsed on the policy, and afterwards lost \$1,450 in another fire, and made claim for the whole amount (\$1,450), when policy was for but \$1,500 in all; *Held*, that the corporation was only liable for the sum insured; and judgment was rendered only for difference between first payment, \$551, and the sum (\$1,500) insured by the policy. *Crombie v. Portsmouth Mut. Ins. Co.* 6 Fost. N. H. 389. 1853.

TAXATION.

§ 1. Where statute provided for the taxation of all corporations deriving an "income" from the capital employed; *Held*, that this could not be restricted to "net income," and that an insurance company, therefore, doing the business of insurance, must pay a tax upon its income received from premiums and interest, although the expenditures of the same company were in excess of such income. *Commercial Ins. Co. v. Supervisors of New York*, 18 Wend. N. Y. 605. 1836.

§ 2. The annual profits of a mutual insurance company, which are retained and invested as a fund for the payment of its debts and yielding an income to its members, are capital within the meaning of the Revised Statutes of New York, and upon which, as such, taxes may be legally assessed. Nor is the act of the legislature, imposing such tax, in conflict with the Constitution of the United States. *Sun Mut. Ins. Co. v. City of New York*, 5 Sandf. N. Y. 10. 1851.

§ 3. Where charter forbids distribution of an accumulated fund, earned from insurance, among stockholders; the company is liable to taxation on account of such funds, within the meaning of the statute in New York. *Mutual Ins. Co. v. Supervisors of Erie Co.* 4 Comst. N. Y. 442. 1851.

§ 4. A tax laid upon agents of foreign insurance companies, from other States, doing business in another State, does not conflict with the clause of the Federal Constitution, guaranteeing to the citizens of each State the privileges of citizens of the several States. *Tatem v. Wright*, 3 Zab. N. J. 429. 1852.

§ 5. The charter of a mutual company provided for the creation, out of certain of the premiums and out of the net profits, of a permanent fund to be invested for the security of creditors. Certificates of their respective interests in this fund were issued to the members. *Held*, that this fund became capital stock, and that the company were liable to be taxed on it as such. *Sun Mut. Ins. Co. v. Mayor of New York*, 4 Seld. N. Y. 241. 1853.

§ 6. The 14th and 15th Vic., Cap. 128, does not confer on the corporation of the city of Montreal, power to impose a duty on the agents of foreign insurance companies doing business in the city, and consequently any by-law affecting to impose such duty is null and void. *Mayor, &c. v. Wood*, 9 Lower Canada, S. C. Montreal, 449. 1859.

See Foreign Insurance Companies, § 21, 25.

THEFT.

§ 1. Where policy provided, "and it is hereby declared that this company shall not be liable to make good any loss by theft; or any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power;" *Held*, that the clause protecting company against losses by theft, was independent of the one immediately following; and assured could not recover for losses by theft, although another clause in policy required assured "to use all diligence in removal and preservation of the property, and in case of failure on his part so to do, the company would not be liable for loss or damage sustained in consequence of such neglect;" and such loss by

theft was occasioned by assured removing goods, in compliance with such last clause. *Webb v. Protection & Ætna Ins. Co.* 14 Mo. 3. 1851.

§ 2. An insurance company, insuring against fire, is responsible for the loss of goods stolen during the fire, there being no exception in the policy against theft. *Tilton v. Hamilton Fire Ins. Co.* 14 How. N. Y. 363. 1857.

§ 3. Insurers against fire alone are liable for loss by theft, consequent upon the careful removal of the insured goods by the insurance watch, from a burning building in which they must otherwise have been burned, it being a "loss or damage by fire." *Tilton v. Hamilton Fire Ins. Co.* 1 Bosw. N. Y. 367. 1857.

§ 4. Where policy provided that, "in case of fire or of loss or damage thereby, it shall be the duty of assured to use their best endeavors for saving and preserving the property," &c.; *Held*, that the value of goods lost or stolen, whilst in process of removal, (in accordance with the above requirement of the policy,) from a building actually on fire, was a loss within the terms of the policy. *Independent Mut. Ins. Co. v. Agnew*, 34 Penn. St. 96. 1859.

§ 5. The liability of an insurance company for losses by theft, (there being no exception of losses by theft in the policy,) is not restricted to the precise period when the fire was extinguished; the precise time when a theft occurs is not important, if it be occasioned directly by the fire. *New Mark v. London & Liverpool Fire & Life Ins. Co.* 30 Mo. 160. 1860.

§ 6. If the assured uses his utmost exertions in protecting and securing the property insured, at, during, and subsequently to the fire, a loss by larceny falls upon the insurers. *Witherell v. Maine Ins. Co.* 49 Me. 200. 1861.

§ 7. Where by the terms of a policy the assured in case of fire is under obligation to labor for the protection of the goods insured, and such goods in an attempt to avoid a fire are injured or stolen, the insurer is liable for the loss. *Talamon v. Home & Citizens Mut. Ins. Co.* 16 La. An. 426. 1862.

§ 8. An insurer is not liable for goods stolen in transit from a burning building because the fire warden advised the removal of the property, where the policy contains a clause excluding responsibility for loss by theft during or subsequent to the fire. *Fernandez v. Merchants' Mut. Ins. Co.* 17 La. An. 131. 1865.

See Removal, § 2. Risk, 14.

TITLE.

§ 1. Failure to disclose the fact that property insured stood upon ground leased by assured; *Held*, to avoid the policy in a mutual company, where the property was bound for payment of the assessments. But as the failure to disclose arose through ignorance, without fraud; *Held*, that the premium and interest thereon from time of its payment should be returned to the assured. *Mutual Assurance Co. v. Mahon*, 5 Call, Va. 517. 1805.

§ 2. The property was described by insured as "their" stone mill. Proof was, that their title was in part good, in part derived from executory contract, and in part that of mortgagees. *Held*, a misrepresentation as to title, which, if material to the risk, avoided the policy. *Columbian Ins. Co. v. Lawrence*, 2 Pet. U. S. 25. 1829.

§ 3. A representation, in reply to a question as to title, that the property was "his," when he held but a life

estate, and built the house on land belonging to his wife and her sister in common, with the right to dispose of it by removal or occupation, is not such a misrepresentation as will avoid the policy, in the absence of intentional deception, or over-valuation of the house. *Curry v. Commonwealth Ins. Co.* 10 Pick. Mass. 535. 1830.

§ 4. Assured is not bound to disclose the nature of his title to the insurers, unless it is inquired about, or required to be disclosed by condition in the policy. *Curry v. Commonwealth Ins. Co.* 10 Pick. Mass. 535. 1830.

§ 5. The assured's house had been mortgaged, and the equity of redemption seized on execution, when he insured it as "his" property; no inquiry having been made by the insurers as to the state of his title. *Held*, that this fact was not material to the risk, and that there had been no misrepresentation in the statement that it was "his" property. *Strong v. Manufacturers' Ins. Co.* 10 Pick. Mass. 40. 1830.

§ 6. Where policy required no disclosure of the title or interest to be insured, and assured called it "his" building when it stood upon land of another, under verbal lease, terminable at six months' notice; *Held*, not to be such a concealment as would avoid the policy. *Fletcher v. Commonwealth Ins. Co.* 18 Pick. Mass. 419. 1836.

§ 7. Whenever the nature of the interest insured might have an influence upon the underwriter, either not to underwrite at all, or not to underwrite except at a higher premium; it must be deemed material to the risk, and a misrepresentation or concealment of it will avoid the policy. A decisive test of materiality is to ascertain whether, if the true state of the title had been known, it would have enhanced the premium. This question of materiality is one of fact for the jury; and there is no presumption of law that a mis-description of the premises, material to the risk, did reduce the premium; the infer-

ence in such case being one of fact to be left to the jury. *Columbian Ins. Co. v. Lawrence*, 10 Pet. U. S. 507. 1836.

§ 8. Where the charter of a mutual company provided that, in case the insured had less than an unencumbered fee simple title, and the same was not expressed in the policy, it should be void; and no suggestion of any less title was contained in the policy in question, or the application therefor; *Held*, that there was a warranty of such title; and that the insured was required to prove such title at the trial; and that the statement of a witness, that the party owned the property insured, did not show such title. In Illinois the insured should prove the title to his real estate down from the United States. *Illinois Mut. Fire Ins. Co. v. Marseilles Manuf. Co.* 1 Gilm. Ill. 236. 1844.

§ 9. If the insured at time of insurance represent, and insure, the whole property as his, when in fact he owns but one half; the policy is void, whether the misrepresentation be through ignorance or design. *Catron v. Tennessee Ins. Co.* 6 Humphrey, Tenn. 176. 1845.

§ 10. The charter of the insurance company provided, that the policy shall be deemed valid and binding on the company, in all cases where the insured has a title in fee simple to the buildings insured, and the land covered thereby; but if the assured have a less estate therein, the policy shall be void, unless the true title of the assured be expressed therein and in the application therefor. The assured had purchased the estate in fee from a corporation and was in possession, but, by reason of a defect in the execution of his deed, the legal title did not pass to him. *Held*, that the assured, having the equitable title in fee simple, was entitled to recover, and that by the term in the charter, "less estate therein," was intended estates of less duration than estates in fee simple. *Swift v. Vermont Mut. Fire Ins. Co.* 18 Vt. 305. 1846.

§ 11. A statement in a policy, that the premises insured were the property of plaintiff, does not amount to a warranty; and the declaration need not aver such ownership. *Gilbert v. National Ins. Co.* 12 Irish Law, 143. 1848.

§ 12. Where policy stipulated, "that the true title of assured must be disclosed, or the policy should be void;" and the policy was issued subject to the act of incorporation and by-laws, to the "lien thereby established on the property insured," and the assured call the property "theirs," without anything further being said as to the nature of their title, and it appeared that they only held a bond for a deed; *Held*, that the policy was void. *Brown v. Williams*, 28 Me. 262. 1848.

§ 13. Assured was a tenant for a year, and in policy the property was described as "his building." *Held*, not equivalent to a warrantee, on the part of assured, that he was the owner of the tenements, when no inquiry was made as to the interest to be insured, nor does it constitute a material misrepresentation of the fact. *Niblo v. North American Ins. Co.* 1 Sandf. N. Y. 551. 1848.

§ 14. A policy of a mutual insurance company required the disclosure of the "true title" in the application for insurance, and provided that the company should have a "lien" upon the property insured. In the application, which was made part of the policy, the applicants described the property to be insured as "theirs," when in fact they only held a bond for a deed, on certain conditions; *Held*, that the policy was void. *Smith v. Bowditch Mut. Ins. Co.* 6 Cush. Mass. 448. 1850.

§ 15. Where condition in act of incorporation of a mutual insurance company provided, "That if the insured have an estate less than fee simple to the buildings insured and the lands upon which they stand, the policy shall be void, unless the true title of the insured, and the encum-

branches, be expressed in the policy, and in the application therefor," and in the application, Philips, Beckel & Co. to whom policy was issued, represented the property as theirs, in answer to inquiry, and also failed to disclose four encumbrances on the same, when in fact they were but stockholders in the "Dayton Hydraulic Company," in which company the fee vested, and which company had leased the premises for 99 years to other parties. *Held*, that the failure to state the true title and encumbrances, was in violation of the condition and avoided the policy; although Philips, Beckel & Co. were also all the stockholders of the Hydraulic company. *Philips v. Knox County Mut. Ins. Co.* 20 Ohio, 174. 1851.

§ 16. Where charter provided that "if assured have a less estate than fee simple, or if the premises be encumbered, policy may be void, unless the true title of the assured and the encumbrances on the premises be expressed therein," and assured described himself in the application, as "owner of the buildings," and the company had no other notice of his title, and it appeared that he was a tenant by courtesy only; the policy is void. *Leathers v. Ins. Co.* 4 Fost. N. H. 259. 1851.

§ 17. Charter provides "that no insurance shall be made unless insured has a good and perfect unincumbered title." This implies a title, good both at law and in equity; and an outstanding mortgage avoids the policy, even though there is a parol proof that the debt has been paid. *Warner v. Middlesex Mut. Association Co.* 21 Conn. 444. 1851.

§ 18. Assured applied for insurance on a grist mill, a water wheel and one run of stones, &c.; and described the property as "his," when in fact he was but the lessee of the mill, and represented that two-thirds the value of the mill was £300, obtaining insurance for that amount, when in fact the proof was that it was only worth £150. *Held*,

that the statements in his application, on which he obtained the insurance, were untrue in two most important particulars, to wit: as to ownership of the property, and value of the mill, and especially of his interest in it, and that he could not therefore recover. The affidavit required by the condition, was made by assured, but was not verified by oath or affirmation, and was not in the form of an affidavit; *Held*, therefore, that upon that ground also the assured was precluded from recovering. *Shaw v. St. Lawrence Co. Mut. Ins. Co.* 11 Upper Canada, Q. B. 73. 1852.

§ 19. Where it is stipulated "that policy shall be void, unless the true title of the insured be expressed in the application;" a failure to make known that another person owns part of the property, and having it described in the policy as "his" property, will avoid the policy. *Wilber v. Bowditch Mut. Ins. Co.* 10 Cush. Mass. 446. 1852.

§ 20. A policy in a mutual company, provided "that any policy issued by the company shall be void, unless the true title of the assured be expressed in the proposal or application for insurance." There was a question in the application as to encumbrances, which was truly answered, but none asking information as to the "title" other than the one as to encumbrances. The applicant called the property insured "his property." At the time the application was made, the assured was in actual possession of the property, and though the estate was variously and heavily encumbered by mortgages, sales on execution, and otherwise, yet these were all redeemable, and upon payment of them the assured would have had the fee of the estate. *Held*, that there was no misrepresentation as to title. *Buffum v. Bowditch Mut. Ins. Co.* 10 Cush. Mass. 540. 1852.

§ 21. The assured's application for an insurance with the defendants contained the following questions and an-

swers. Question.—“Occupied by applicant or tenant?” Answer.—Tenant.” Q.—Title by deed, or how?” A.—“Deed.” Q.—Encumbered or not, if not say no? A.—“No.” The assured afterward made affidavit “that he is the *bona fide* owner of the said property and of the said policy; that the said property is not and was not in any way encumbered by mortgage or otherwise.” It appeared that the assured was assignee of one J. P., who had a lease from one M. at a yearly rent, with a right of purchase at a certain price; and that there was a mortgage from M. to one H. including the property insured. *Held*, that (irrespective of the mortgage) the assured had misrepresented his title, and could not recover on the policy. Walroth v. St. Lawrence County Mut. Ins. Co. 10 Upper Canada, Q. B. 525. 1852.

§ 22. The charter of a mutual company authorized “insurances on any kind of property,” and provided that the premium notes should be a lien on the real estate insured. The insured having a mixed interest, derived in part as trustee, in part as an executor, and in part as creditor, effected an insurance with such company, without any disclosure of the nature of his title, or any questions asked concerning it, or any conditions in the policy requiring such disclosure; and upon happening of the loss, company set up in defense, that the charter of the company did not allow an insurance on any real estate except such upon which the assured could create a valid lien to the company. *Held*, that the charter authorized insurances on any kind of property, personal as well as real, and that assured had a lien at the time of insurance and at time of loss, which was an insurable interest under the charter. Allen v. Mutual Fire Ins. Co. 2 Md. 111. 1852.

§ 23. Where act of incorporation provided that if assured have a less estate than a title in fee simple, unencumbered to the buildings insured, and to the land covered by the same, the policy shall be void, unless the true title of the insured and of the encumbrance on the prem-

ises be expressed therein, and in the application therefor, and the plaintiff's application represented that they were the owners in fee, and that the premises were not encumbered, when in fact they were only interested as mortgagees; *Held*, there could be no recovery on the policy. *Brown v. Gore District Mut. Ins. Co.* 10 Upper Canada Q. B. 353. 1852.

§ 24. Failure to disclose true title or extent of interest in absence of fraudulent concealment or misrepresentation, will not avoid policy; no inquiry as to title or interest being made. *Morrison v. Tennessee Marine & Fire Ins. Co.* 18 Mo. 262. 1853.

§ 25. Where insured called it "his stock of tobacco," under policy in which no disclosure of interest or title was called for; and the facts were, that the tobacco was owned jointly by assured and another party; *Held*, not to be a misrepresentation that avoided the policy; and assured might recover to the extent of his interest. *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. (22 Ohio) 452. 1853.

§ 26. Where policy provided for "a true statement of the interest of the assured, if less than fee simple," and also for "a lien on all buildings insured; and the assured represents the property as "his building," when in fact it had been erected on land of another, under an agreement to purchase (assured to pay rent in the mean time); and the conditions of such purchase had not been fulfilled at the time of the insurance; *Held*, that in the absence of knowledge on the part of the underwriters of the true state of the title, the policy was void for misrepresentation. *Marshall v. Columbian Mut. Ins. Co.* 7 Fost. N. H. 157. 1853.

§ 27. The policy required the applicant for insurance to make a true representation as to his title and interest in

the property to be insured. In the application which was made a part of the contract, was this question: "Whose is the property insured?" To which answer was made: "L. Miller's." In fact, L. Miller was a judgment creditor, to whom this property had been set off on execution, subject to two small mortgages to other parties, and at time of insurance, as well as at time of loss, the debtor's equity of redemption had not expired. *Held*, that the omission to make known the debtor's equity of redemption was not such a misrepresentation, within the meaning of the condition, as would avoid the policy. *Clapp v. Union Mut. Fire Ins. Co.*, 7 Fost. N. H. 143. 1853.

§ 28. A. owned a tannery building, and B. owned the stock therein. Agent of the insurance company knew the nature of the several interests, and, at his suggestion, they took out insurance in their joint names. One condition of the policy required a full disclosure as to title and encumbrances, under penalty of forfeiture. In an action thereon in the names of A. and B.; *Held*, that the policy was good and that the action might be maintained; and also that parol evidence was admissible to show that the parties agreed to treat such insured property as the joint property of the two owners. *Peck v. New London Mut. Ins. Co.* 22 Conn. 575. 1853.

§ 29. Under a clause in a mutual company, giving the company a lien on property insured to the amount of the premium note, and declaring that a false representation, material to the risk, should avoid the policy; the policy was held void, because the title of assured was derived by a defective tax title, and foreclosure of mortgage on only one-half the property. *Pinkham v. Morang*, 40 Me. 587. 1855.

§ 30. Assured in application, which was made part of the policy, in reply to question, answered that the land on which the building was erected was hers; when she had only a life estate, but her husband's will had made no

disposition of the remainder, and the heirs had never made claim during twelve years since probate of the will. *Held*, that the answer was substantially true, and not such a misrepresentation as to avoid the policy, which contained no stipulation requiring a disclosure of title, other than that required by the question in the application. *Allen v. Charleston Mut. Fire Ins. Co.* 5 Gray, Mass. 384. 1855.

§ 31. The by-laws of defendant provided, that "any policy issued by this company shall be void, unless the true title and interest of the assured be expressed in the application," &c. In answer to the question in application, "whose is the property to be insured?" the answer was "applicant's;" and in the policy, and application also, the property was designated as "his stone dwelling-house." The plaintiff had been in possession of the land for several years under an executory agreement for the purchase thereof, had erected the insured building, and before the application for insurance had paid all the purchase money, but had not yet the legal title in himself. *Held*, that this was not a false warranty of title within the meaning of the by-law, nor in any sense; the plaintiff being the owner of the dwelling-house and land. *Chase v. Hamilton Mut. Ins. Co.* 22 Barb. N. Y. 527. 1856.

§ 32. Where policy provided that "in all cases of application for insurance in this company, the applicant shall state the true value of the property, and also the encumbrance on the same," and again "if the interest to be insured be a household or other interest not absolute, it must be stated in the policy, otherwise the policy shall be void," and in reply to interrogatory in application as to encumbrance, the assured answered that there was no encumbrance, when in fact he was in possession under an agreement to purchase and had paid but a small sum of the purchase money, the balance being a claim or lien against the property; *Held*, that the concealment of the facts and insurance of the property on his own account, for a larger sum than the amount of purchase money actually paid at

time of the insurance, avoided the policy. *Reynolds v. State Mut. Ins. Co.* 2 Grant, Pa. 326. 1856.

§ 33. Policy stipulated "that the assured should make a true representation as to title and interest, and also as to encumbrances, or policy should be void." To questions: "Who owns the buildings?" and "whether encumbered?" he answered, "owned by insured;" "no incumbrance;" when in fact he was but the mortgagee and had no other title. *Held*, to be such a misrepresentation of "title and interest" as to avoid the policy. *Jenkins v. Quincy Mut. Fire Ins. Co.* 7 Gray, Mass. 370. 1856.

§ 34. Insurance on property described "his goods," in absence of fraud or misrepresentation, will protect the interest of the insured, who is in fact owner of them, although his co-partner is interested in the application and profits of such goods. *Irving v. Excelsior Fire Ins. Co.* 1 Bosw. N. Y. 507. 1857.

§ 35. Plaintiff, being partner in a firm of two, and owning all the property and assets of said firm, the other being interested only in the profits, obtained insurance on "his stock of cabinet ware, furniture," &c., under policy, stipulating that, if the "interest to be insured be a leasehold interest or other interest not absolute, it must be expressed in writing, or the policy shall be void." *Held*, that his interest was an absolute equitable interest, to which the above provision did not apply. *Irving v. Excelsior Fire Ins. Co.* 1 Bosw. N. Y. 507. 1857.

§ 36. Where assured has only a qualified interest, the mere fact of not disclosing the nature and extent of that interest, in the absence of inquiry on the subject, and calling the property "his," in the policy, will not avoid it; unless that interest be misrepresented, or some artifice is used to conceal it, or to prevent the insurer from inquiry respecting it, in which case it is a question for the jury to decide, whether the misrepresentation or concealment is of

a character to have prejudiced the insurer and amounts to a fraud. *Sussex County Mut. Ins. Co. v. Woodruff*, 2 Dutch. N. J. 541. 1857.

§ 37. The charter of a mutual insurance company provided, that every person obtaining insurance should thereby become a member during continuance of policy, &c.; that his land, upon which the insured buildings stood, should be pledged to the company, who should hold a lien thereon; and that policies should be deemed valid in all cases where the insured had a title in fee simple, unincumbered; but if the assured had a less estate in the land, then the policy to be void, unless the true title of the assured be expressed in the policy. In the application made by assured was this question: "Have you a clear title to the property, which you wish to be insured?" In reply to which, the answer was: "It was the house and possessions of J. P. Foree, whose title was as good as any man's in the country, and who was the father of my wife." No further explanation as to the title was made, and policy was issued to assured in his own name, when in fact the property belonged to his wife. *Held*, that such answer did not express the true title of the assured, and that the policy was not binding upon the company. *Eminence Mut. Ins. Co. v. Jesse*, 1 Metf. Ky. 523. 1858.

§ 38. The condition in policy, that "it shall be void if the party insuring his goods or buildings shall cause the same to be described in the policy otherwise than as they really are, so as the same be charged at a lower premium than is herein proposed," relates to a misdescription of the property, and not to the character of title or interest in it. *Franklin Fire Ins. Co. v. Coates*, 14 Md. 285. 1859.

§ 39. A lessee of land for a term of years, "with the right to remove the buildings to be erected thereon, or sell them to lessor at an appraised value," effected an insurance on the buildings as the owner thereof; the policy contained a condition that "if the interest in the property to be in-

sured be a leasehold interest, or other interest not absolute, it must be so represented to the company, and expressed in the policy in writing, otherwise the insurance shall be void." *Held*, that the insured, being the absolute owner of the buildings, had a right to insure them as such, and was not bound to disclose the extent of his interest in the land on which they stood. *Hope Mut. Ins. Co. v. Brolasskey*, 35 Penn. St. 282. 1860.

§ 40. Where policy provided that "if the interest to be insured be a leasehold, mortgagee, or other interest not absolute, it must be so expressed in writing in the policy, or policy shall be void;" and the applicant, in applying for insurance, described the interest to be insured as "a mechanic's lien;" *Held*, that the failure to disclose that the lien attached to a building standing upon leased ground, or that the lien had not been established by judgment of court at the time of the insurance, did not avoid the policy, under the above condition. *Longhurst v. Conway Fire Ins. Co.* U. S. District Court, Northern Division, Iowa, Oct. 1861.

§ 41. In the application the question, "Is it encumbered? If so, for what sum?" was answered, "Applicants are mortgagees in possession. Other encumbrances exist." In fact the assured held the third mortgage on the premises, but were also assignees of the two others, and had the right of possession to the premises. *Held*, that there was no such misrepresentation of the title as would avoid the policy; and, 2d, that the issuing of the policy upon such application, without the amount of the encumbrances being stated, was a waiver of such an objection; and as the insured were in possession under a first mortgage, which gave them an unencumbered interest several times greater than the amount of insurance, the amount of the mortgages was not material. *Nichols v. Fayette Mut. Fire Ins. Co.* 1 Allen, Mass. 63. 1861.

§ 42. Policy provided that "any policy issued by this

company shall be void, unless the true title of the insured in the property be expressed in the application for insurance;" and in the application itself, there was no direct question or statement as to title, but in reply to a question as to encumbrances, the assured stated as follows: "First mortgage to M. W. (name of assured) entered Oct. 1855;" and in reply to a question, whether the property was insured, stated as follows: "Not on the first mortgagee's interest. Not known to be by any other concern." The assured was the mortgagee in possession, and the insurance was not on her dwelling house, but on "dwelling house." *Held*, that the answers, taken in connection with the fact that there was no other statement of the interest of the applicant to control or modify it, or calculated to mislead, must be deemed to represent the interest of the applicant truly, and to apprise the company that she was not the absolute owner in fee simple; and, if not sufficiently full, it was the duty of the company to require further and fuller statements. *Wyman v. People's Equity Ins. Co.* 1 Allen, Mass. 301. 1861.

§ 43. An applicant for insurance had described the property in a written application as "his house," and it was so described in the policy. The policy contained the following condition: "If the interest to be insured be a leasehold interest or other interest not absolute, it must be so represented to the company, and expressed in the policy in writing, otherwise the insurance shall be void." The legal title to the property was in another, with whom the assured had, at time of application, made a parol contract for its purchase, for a price agreed upon, to be paid unconditionally, and a part of which he had paid, and the insured had also entered into possession as purchaser and had made valuable improvements on the property. Evidence, showing the above state of the title, was held admissible, and the jury instructed that the assured was to be regarded as the owner of the property, if he had the equitable title, and his interest was such that the loss would fall on him, if the property was destroyed; that

in such case the property was "his" within the fair import of the application, in which it was described as his; *Held*, that the admission of the evidence and the charge to the jury were correct; *Held*, also, that an interest which is so completely vested in the party owning it, that he cannot be deprived of it without his consent, was an "absolute" interest; that the terms "interest" and "title" were not synonymous; that "absolute" was here synonymous with "vested," and was used in contradistinction to contingent or conditional, and that the interest insured was a "vested" interest, and, therefore, an "absolute interest," within meaning of the condition of the policy. *Hough v. City Fire Ins. Co.* 29 Conn. 10. 1860.

§ 44. The by-laws of a mutual insurance company, by express condition made part of the contract, provided that the written application for insurance should be a part of the policy, and should be held to be a warranty on the part of the insured, and that the policy should be void unless the true title and interest of the insured were stated in the application and all encumbrances on the property disclosed, and unless the applicant should make a true statement of all the facts inquired for in the application. The application contained the following inquiry: "Whose is the property insured and is it encumbered, and for how much? State the true title and interest." To this the assured had replied: "Owned by me; encumbered to several; about \$6,000." There were, in fact, mortgages on the property to the amount of \$13,000, and the assured had conveyed all his remaining interest to his brother, by an absolute deed, both the deed and the mortgages appearing on the public records. The mortgages, however, beyond the \$6,000, and the deed to assured's brother, were given without consideration, and for the purpose of defrauding creditors, and the brother had agreed to re-convey the title whenever requested. *Held*, that the conveyance being good between the parties, the property was to be considered as encumbered beyond the amount stated by the assured, and the assured as having no title or insurable interest, and

that he could not therefore recover. *Held*, also, that the representation of the assured, with regard to the ownership of the property, was not relieved by the fact that the deed to his brother was made and placed upon record without the knowledge of the latter, and that on being informed of the fact, the grantee, at first, refused to receive it, and afterwards only agreed that the title might remain in him to be re-conveyed whenever the assured should desire; the deed being good between the parties, and the right to a re-conveyance being one which a court of equity would not enforce. *Treadway v. Hamilton Mut. Ins. Co.* 29 Conn. 68. 1860.

§ 45. An insurance company is chargeable with knowledge of all the facts stated by an applicant to the company's agent, respecting an applicant's title and interest in the premises; and if the applicant truly states to the agent the real condition of the property, he cannot be held to have made any mis-statement, or practiced any concealment, notwithstanding the written application varies from such statement. *Hodgkins v. Montgomery County Mut. Ins. Co.* New York Supreme Court, General Term, 5th District, 1861. *American Law Register*, (February, 1862,) Philadelphia.

§ 46. A condition annexed to the policy provided that when the interest insured was a leasehold interest, it should be so expressed in the policy or it should be void. The building insured (a four story brick building) was described in the policy as owned by assured. The building was in fact erected by assured on leased ground, and contained a provision that at the expiration of the term (twenty years) a two story brick building was to be left on the premises. *Held*, that the building was owned by assured, and that the interest insured was not a leasehold interest within the meaning of the condition. *David v. Hartford Fire Ins. Co.* Supreme Court of Iowa, April Term, 1862. Not yet reported.

§ 47. An applicant for insurance on personal property

who has made, but not delivered a bill of sale thereof, taking in return only a promissory note secured by mortgage thereon, may truly represent and warrant himself to be the owner thereof. *Vogel v. People's Mut. Fire Ins. Co.* 9 Gray, Mass. 23. 1857.

§ 48. Two partners, in an application for insurance, which was required to contain "a full, fair and substantially a true representation of all the facts and circumstances respecting the property, so far as they are within the knowledge of the assured and are material to the risk," stated that they owned the land on which the building to be insured stood. In fact, one of them, to whom the policy was made payable, owned it, and the other was charged on their books with half its cost. The partnership was afterwards dissolved, and all that owner's interest in its assets transferred to his co-partner, to whom the insurers, with notice of the facts, agreed that the policy should "stand good." *Held*, that the insurers were liable for a loss by a subsequent fire. *Collins v. Charlestown Mut. Fire Ins. Co.* 10 Gray, Mass. 155. 1857.

§ 49. An application made to a mutual insurance company, in a printed form issued by them, by one of their agents, without knowledge of the person to be insured, for insurance on a building, stated that "the property to be insured" belonged to him; when in fact he owned the building only, and was a mere tenant at will of the land on which it stood. A policy was issued thereon, expressly made subject to the lien of the company on the interest of the assured in any personal property or buildings insured and the land under such buildings; upon which lien the company expressed their intention to rely; and to the by-laws, the conditions of which were declared to be part of the policy, and provided that the application should be a part of the policy and warranty on the part of the assured, that any policy should be void "unless the true title and interest of the insured be expressed in the proposal or application," that "property held by lease, or

standing on land so held, shall not be insured, unless specially described as such in the application," that "in case the application is made through an agent, the applicant shall be held liable for the representation," and that "no insurance agent or broker forwarding applications to this office is authorized to bind the company in any case whatever." *Held*, that the assured by accepting the policy adopted the representations of the agent; that the failure to specify the nature of his interest avoided the policy; and that parol evidence of the agent's knowledge of the actual facts was admissible. *Kibbe v. Hamilton Mut. Ins. Co.* 11 Gray, Mass. 163. 1858.

§ 50. That A. permitted his son B. to use his name in buying and selling goods, and that the business was transacted in the name of A. & B., the goods being in fact wholly owned by B. does not so affect the legal rights of other parties as to render void a policy of insurance effected on the goods in the name of B. *Gould v. York County Mut. Fire Ins. Co.* 47 Me. 403. 1859.

§ 51. A misrepresentation of title, in the application to a mutual fire insurance company, avoids the policy, and a subsequent assignment of such policy, with the consent of the company, adds nothing to its validity. *Merrill v. Farmers' & Mechanics' Mut. Fire Ins. Co.* 48 Me. 285. 1860.

§ 52. If a policy of insurance issued by a mutual insurance company contains a provision that it is "upon the express condition that the application upon which this policy is founded shall be held to be a warranty on the part of the insured, and as absolutely a part of this policy and of the contract of this insurance as if it was actually written in and incorporated in full," and the application contains a clause inserted after the printed questions by which the applicant covenants "that the foregoing is a full and correct description and statement of all the facts inquired for or material in reference to this insurance,"

"that the above statements are substantially true," and that the misrepresentation or suppression of any facts inquired for or material shall destroy his claim for a damage or loss," the applicant must be held to warrant that all facts inquired for are correctly given, whether material or not. In such case a policy issued to the "Abbott Worsted Co.," upon an application signed "Abbott Worsted Co., J. W. A., Treas.," will be rendered invalid, if in reply to a question in the application, "Whose is the property insured?" the answer is, "Applicants," when in fact it belonged solely to J. W. A., and parol proof is inadmissible to show that the true state of the title was known to the agent through whom the insurance was effected, if the policy contains a provision that every such agent is the agent of the applicant and not of the company. *Abbott v. Shawmut Mut. Fire Ins. Co.* 3 Allen, Mass. 213. 1861.

§ 53. Where a policy granted upon several parcels of property, each separately valued requires that the insured should accurately state his title, a failure to disclose his true title as to any one of the parcels will avoid the policy as to all of them. *Day v. Charter Oak Fire & Marine Ins. Co.* 51 Me. 91. 1862.

§ 54. D. received a deed, absolute in form, of certain real estate, to secure him against loss for liabilities he had assumed or might assume for the grantor; and afterwards gave the grantor a written agreement to re-convey upon being indemnified. The property was insured by D. without disclosing the nature of his interest therein. One of the conditions in the policy was, that "property held in trust" to include that "held as collateral security" must be insured as such. *Held*, in an action on the policy, that the property was held by D. as collateral security, and therefore "held in trust" within the meaning of the policy. *Day v. Charter Oak Fire & Marine Ins. Co.* 51 Me. 91. 1862.

§ 55. Where an insurance of the interest of a mort-

gagee in possession was renewed, as of December 1, 1861, it will not affect the policy by way of misrepresentation of his interest in the subject of insurance, that on December 2, 1861, he took a release of the equity of redemption from the assignors of the mortgagor, although the renewal was procured after the release; nor will such release affect his insurance by way of merging his mortgage, when his mortgage is at the time pledged to a bank as security for his endorsements, and his interest and design is that it should be kept separate from the equity. The clause in a policy, that if the property insured "shall be sold or conveyed, this policy shall be null and void," refers to a sale or conveyance of it by the insured, determining his interest in the subject of insurance, and not to a sale or conveyance to him, to the increase of his interest in it. *Heaton v. Manhattan Fire Ins. Co.* 7 R. I. 502. 1863.

§ 56. If an application for insurance is expressly made a part of the policy, and the policy is also made subject to the conditions and limitations expressed in the by-laws annexed, and these by-laws provide that the policy shall be void if the application shall not express the true title of the assured to the property and his interest therein, an answer that the applicant owns the property to be insured, in reply to a direct inquiry in the application upon that subject, when in fact he only holds a bond for a deed, will avoid the policy. So an answer in such application that the property is encumbered "for \$1,000 with other property" in reply to the question, "Is it encumbered by mortgage or otherwise? If so, for what sum?" will avoid the policy, if in fact there is a mortgage for \$1,400 upon the property insured and other property. *Falis v. Conway Mut. Fire Ins. Co.* 7 Allen, Mass. 46. 1863.

§ 57. The condition annexed to a policy of insurance, and forming a part thereof, required that applications for insurance should specify the nature of the applicant's title, if less than fee simple; and that any misstatement or

concealment relative to this and other requirements should render the insurance void. B. in an application for insurance, represented that he owned the property by virtue of an article of agreement with C. The agreement, as proved, was for the sale of a village lot by C. to B. without any exception or reservation, for a specified sum to be paid by B. The dwelling-house was on the lot at the date of the agreement, and when the insurance was applied for. There was no proof that B. represented, in his application, that he owned the dwelling-house as a chattel not affixed to the soil. *Held*, that the contract of insurance related solely to the interest which B. had in the building, as the vendee in possession of the soil on which it stood, under the contract with C.; and that the judge on the trial properly overruled B.'s offer to prove that the building was a chattel not affixed to the freehold, and that at the time of the insurance he was the owner of it, and continued to be the owner up to the time of the fire. The statement in the application, respecting the nature of B.'s title, was a warranty; and it being untrue, the policy did not take effect. *Birmingham v. Empire Ins. Co.* 42 Barb. N. Y. 457. 1864.

§ 58. An omission to disclose, in an application for insurance on a building, a written agreement by the applicant to convey it in consideration of a certain sum of money to be paid within a fixed time, or to disclose the fact that the greater part of the money orally agreed upon as the consideration for the conveyance was paid before the written agreement was entered into, will not avoid or prevent the recovery of the full amount insured by a policy of insurance which provides that it is issued on condition that the application contains a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property. *Davis v. Quincy Mut. Fire Ins. Co.* 10 Allen, Mass. 113. 1865.

§ 59. A policy contained a clause to the effect, "that if the interest in the property to be insured be a leasehold,

trustee, mortgagee or reversionary interest, or other interest not absolute, it must be so represented to the company and expressed in the policy in writing, otherwise the insurance shall be void." The plaintiffs insured the property as owners. Their title was a purchase at a sale under the foreclosure of a mortgage in the State of Illinois, by the laws of which the mortgagor had fifteen months after sale within which to redeem; before the execution of the deed to the plaintiffs the property insured was destroyed by fire, and subsequently the plaintiffs received a deed to the property. *Held*, that the terms of the policy referred not to the nature of the title, whether legal or equitable, but to the nature of the ownership of the property; and further, that the plaintiffs having subsequently acquired the legal title by the deed, the legal title should relate back and take effect from the inception of the equitable title by the purchase at the sale under the foreclosure, so that the plaintiffs at the time the policy was issued were the owners of the property, holding the legal title in fee. *Gaylord v. Lamar Fire Ins. Co.* 40 Mo. 13. 1867.

§ 60. A policy contained a condition that if the applicant was not the sole owner, &c. of the property insured, it must be so expressed in the written part of the policy, otherwise the policy should be void. The applicant owned only an undivided half of the property insured and it was also encumbered by mortgage. Neither of these facts were stated in the policy. In an action to recover for a loss the insured proposed to prove that, after the policy had been made out, but before it was delivered or premium paid, he informed the agent of the company of the true state of the title, and that the agent said it would make no difference. *Held*, that such evidence was admissible, as showing a waiver of the condition requiring the title to be stated in the policy. *Franklin v. Atlantic Fire Ins. Co.* Sup. Ct. Mo. 1868;—2 Am. Law Rev. 778.

See Concealment, § 25. Encumbrance, 1. Entirety and Divisibility of Policy, 8. Insurable Interest, 6, 41. Pleading and Practice, 17, 30, 45. Preliminary Proofs, 6. Warranty and Representation, 32.

TRANSFER OF STOCK.

§ 1. In an action by the assignees of certain shares of stock, for damages for the refusal of the corporation to recognize the transfer on its books, the corporation, immediately after such refusal, having levied an execution on the same shares; *Held*, 1st, that the assignees had a right to buy the shares, and on giving notice to the company to have the transfer recognized, maugre a by-law, requiring the assent of the president of the company to be first given; 2d, that the indebtedness of the assignors did not justify a refusal of such recognition; 3d, that the plaintiffs were entitled to recover as damages the value of the shares at the time of refusal to transfer, with interest from that time. *Sergent v. Franklin Ins. Co.* 8 Pick. Mass. 90. 1829.

§ 2. A. purchased stock of an insurance company for B. The transfer was made to A., "subject to the payments of the installments due on the shares," and A. subscribed the transfer, "accepting the stock on the conditions named in the transfer." The by-laws required the transferee to assume this liability; and it was in consequence of B.'s absence that the transfer was made in A.'s name, at the suggestion of the secretary of the company. *Held*, that A. was personally liable to the company for the unpaid installments. *Long v. Pennsylvania Ins. Co.* 6 Penn. St. 421. 1847.

§ 3. Where a by-law required the consent of the directors "to the transfer of stock by a stockholder indebted to the company," but, in the practice of the company, such cases were never brought before the board; a transfer by such a stockholder, made without that consent,

but according to the usage of the company, is good against the company. *Chambersburg Ins. Co. v. Smith*, 11 Penn. St. 120. 1849.

§ 4. A stockholder in a company empowered the secretary in writing to transfer certain stock; in pursuance of which the secretary entered on the books, "that the stock was transferred, see paper filed," which paper filed, being the power, he wafered to the book, and attested the entry of transfer as secretary; signing no transfer as attorney. *Held*, that this was a substantial compliance with the by-law, which required the transfer to be made "in the books of the company, and to be attested by the secretary." *Chambersburg Ins. Co. v. Smith*, 11 Penn. St. 120. 1849.

TWO-THIRDS OR THREE-FOURTHS CLAUSE.

§ 1. The act of incorporation limited the insurance to be made to three-fourths of the value of the property; and the by-laws made it the duty of the president, alone, or jointly with some of the directors, to examine buildings offered for insurance, and determine the amount to be underwritten thereon; *Held*, that when a valuation was deliberately made by mutual agreement, as a part of the original negotiation, such valuation was, in the absence of all fraud, collusion and misrepresentation, the best evidence of the actual value of the premises insured; and was binding on the company. *Fuller v. Boston Mut. Fire Ins. Co.* 4 Met. Mass. 206. 1842.

§ 2. A company was limited by its charter and by-laws to an insurance of three-fourths of the value of the property. Application valued property at \$4000, and policy was written for \$3500. A loss occurred, and \$3000 was paid. *Held*, in an action for the balance of \$500, that

the company was only liable for three-fourths of the value of the property, as fixed by the application, and that assured could not introduce evidence, *dehors* the policy, to show that there was intended an insurance of \$3000, on the property described, and \$500 on other property. *Holmes v. Charleston Mut. Fire Ins. Co.* 10 Met. Mass. 211. 1845.

§ 3. Where the charter of a mutual insurance company limited them to an insurance of only three-fourths the value of the property, and a by-law reserved the right to have another estimate made of the value of the property at the time of the loss, without regard to the valuation in the policy; *Held*, that recovery by the assured must be limited to three-fourths the value of the property, as found by the jury, at the time of the loss, although the whole actual loss exceeded the amount insured. *Post v. Hampshire Mut. Fire Ins. Co.* 12 Met. Mass. 555. 1847.

§ 4. Where application was referred to and made part of the contract, and provided that the company should only "be obliged to pay as if they had insured two-thirds of the actual cash value of the said property, anything in the policy or application to the contrary notwithstanding;" *Held*, that a recovery for loss must be in accordance with the condition; and that instruction to the jury, therefore, that assured might recover the full value of property destroyed, was erroneous. *Egan v. Mutual Ins. Co. of Albany*, 5 Denio, N. Y. 326. 1848.

§ 5. If a company, by its charter, is prohibited from insuring more than two-thirds the value of any property, and yet voluntarily, and without fraud or misrepresentation, insures more; the policy is not thereby made void. *Williams v. New England Mut. Ins. Co.* 31 Me. 219. 1850.

§ 6. Where charter in a mutual company provided, that the company "should not insure to an amount greater than two-thirds of the value of the property," and, at time

of loss, the defendant's policy, together with another policy on the same property, was in excess of the two-thirds value, as found by the jury; *Held*, that the company was only liable for their ratable proportion of the amount of such two-thirds, as found by the jury. *Goodall v. New England Fire Ins. Co.* 5 Fost. N. H. 169. 1852.

§ 7. The company was limited by its charter to an insurance of not over three-fourths the value of the property. The assured represented the value of the buildings as being \$775, and upon such representation the company insured \$525. At the time of the loss and upon trial of the case, the evidence went to prove that the value of the buildings insured was less than \$525; the house having been wholly destroyed; *Held*, that the best evidence of value was the mutual agreement between the parties, and unless the company could show fraud, collusion or misrepresentation in the fixing of such value, they must pay the sum of \$525 insured. *Philips v. Merrimack Mut. Ins. Co.* 10 Cush. Mass. 350. 1852.

§ 8. Insurance for \$1,400, was made on stock of goods valued in the application at \$3,000. At the time of the loss the value of the goods was but \$1,680. The charter and by-laws of the company formed a part of the policy, and the contract was made having them for its basis. In the charter and by-laws there was no express provision for a re-valuation at time of loss; but by the fifth section of the charter, it was provided that the directors should determine the sum to be insured "not exceeding one-half the value of personal property." The by-laws provided that in case of loss the assured should deliver to the secretary of the company a particular account, &c., "and the value of the property, at the time of the loss;" and as soon thereafter as may be, the directors should determine the amount thereof. *Held*, that under these provisions of the charter and by-laws, and in an insurance upon stock of goods, constantly fluctuating, the valuation in the application was not conclusive upon the company; but that they might

make a re-valuation at time of loss; and that, consequently, they were only liable for the one-half of \$1,680, the value of the goods at time of the fire. *Atwood v. Union Mut. Fire Ins. Co.* 8 Fost. N. H. 234. 1854.

§ 9. A by-law of a mutual insurance company provided, "that in case of loss by fire, the company will in no case pay more than two-thirds on personal property, and three-fourths on real estate, of the actual cash value of the property at risk at the time of the loss." *Held*, that the loss must be determined by the value of the property at the time of the fire, independent of its value at the time of the insurance. *Huckins v. People's Mut. Fire Ins. Co.* 11 Fost. N. H. 238. 1855.

§ 10. At head of the application was a memorandum that no more than one-half the value of personal property should be insured. The charter limited insurance to three-fourths the actual value of real estate, and the by-laws provided that the company would in no case pay more than two-thirds of the actual value of personal property at risk, at the time of the loss. Insured valued his goods at \$2,000, and obtained an insurance of \$1,500 thereon. *Held*, that the memorandum at top of the application was not embraced within the assured's signature, and if it were, that the charter and by-laws controlled such application; and that if assured had goods on hand at the time of the fire to the amount of \$2,250, he might recover \$1,500 insured, if that amount had been destroyed by fire. *Huckins v. People's Mut. Fire Ins. Co.* 11 Fost. N. H. 238. 1855.

§ 11. A by-law, prohibiting insurance to more than two-thirds of the value of the property, is directory to the officers of the company; and an over-estimate, by the agent, will not avoid the policy, unless the insured has taken a fraudulent part in it. *Cumberland Valley Mut. Protection Co. v. Schell*, 29 Penn. St. 31. 1857.

§ 12. Insurance was \$2,500 on stock of goods. The

policy provided that the company would "settle and pay unto the said assured, all losses or damage, not exceeding, in the whole, the said sum aforesaid, which shall or may happen to the aforesaid property," &c., and that "the said losses or damage be estimated according to the true and actual value of the property at the time the same shall happen, and be paid at the rate of two-thirds its actual cash value," &c. The company claimed that they were only liable to pay two-thirds of the actual loss. *Held*, that the proper construction of the two clauses above cited was, that the company should pay two-thirds of the actual value of the property on hand at the time of the fire, not exceeding the sum insured, and that assured might therefore recover the entire sum insured and lost, if it did not exceed two-thirds of the value of the property on hand at time of the fire. *Ashland Mut. Fire Ins. Co. v. Housinger*, 10 Ohio St. 10. 1859.

§ 13. Under a policy of insurance for \$2,000 on property insured elsewhere for \$3,000, which provides that "when property is insured by this company solely, three-fourths only of the value will be taken, and in cases of loss this company will be liable to pay three-fourths only of the value at the time of the loss," and that, "in case of loss or damage of property upon which double insurance subsists, the company shall be liable to pay only such proportion thereof as the sum insured by this company bears to the whole amount insured thereon, such amount not to exceed three-fourths of the actual value of the property at the time of the loss," the underwriters are not liable for more than two-fifths of three-fourths of the value of the property. *Haley v. Dorchester Mut. Fire Ins. Co.* 12 Gray, Mass. 545. 1859.

§ 14. Where the interest of an insured was that of a mortgagee, it was *Held*, that he was not limited to the recovery of two-thirds of the mortgage interest, by the stipulation that the recovery should not exceed two-thirds the value of the property, but was entitled to the whole sum

insured, if it did not exceed his mortgage interest, nor two-thirds the actual value of the property. *Sanders v. Hillsborough Ins. Co.* 44 N. H. 238. 1862.

§ 15. Where a policy of insurance forces the value of the property insured, and contains a condition not to insure more than two-thirds of this value, it is an undertaking on the part of the insured which, if broken, will prevent a recovery on the policy unless the company were informed of the over-insurance and waived the forfeiture. *Lycoming Ins. Co. v. Mitchell*, 48 Penn. St. 368. 1864.

§ 16. A breach of a covenant in a policy, not to insure beyond two-thirds of the estimated value, is a forfeiture of the policy. *Mitchell v. Lycoming Mut. Ins. Co.* 51 Penn. St. 402. 1865.

See Contribution, § 11. Damages, 5, 11. Estoppel, 4. Other Insurance, 34. What Property is covered by Policy, 25.

USAGE.

§ 1. Proof of usage among commission merchants, to insure the goods consigned to them, is admissible. *De Forest v. Fulton Fire Ins. Co.*, 1 Hall, N. Y. 84. 1828.

§ 2. Where buildings were insured at Mobile, Alabama, by a company in New York, and, subsequent to such insurance, other buildings were erected adjoining the one insured, and the company offered to prove an usage at New York, that when the risk was increased by any circumstance, the assured must give notice thereof to the company, who were then to have the option of continuing or annulling the policy; *Held*, that evidence of such usage

was not admissible for two reasons: 1st, because it was local, applying only to insurance on property in the city of New York; and 2d, that if it were a general usage, it could not be given in evidence, to alter the legal operation and effect of the policy. *Stebbins v. Globe Ins. Co.*, 2 Hall, N. Y. 632. 1829.

§ 3. The insurance was on a stock of goods, described as being contained in a "two story frame house, filled in with brick." *Held*, that assured might introduce evidence to show an usage, as between assured and insurer, to consider a house, having a brick wall on one side, and a house filled in with brick on the other, and filled in with brick in front and rear, as falling within the description of "a house filled in with brick." *Fowler v. Aetna Ins. Co. of New York*, 7 Wend. N. Y. 270. 1831.

§ 4. A policy of insurance against fire upon a "barque now being built" in the port of Baltimore, is not controlled in its operation by proof of usage in other ports of the Union. Such usage could not be considered as entering into the views of the parties at the time of making the contract. *Mason v. Franklin Fire Ins. Co.*, 12 Gill. & Johns. Md. 468. 1842.

§ 5. In an action on a policy of reinsurance, which agreed to make good "all loss or damage by fire;" *Held*, that evidence of an usage among insurers in the city of New York, for reinsurers not to pay the full amount named in the policy of reinsurance, but only a sum which should be in the same proportion to the amount of the property destroyed as the policy of reinsurance bore to the original policy, was incompetent. *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. N. Y. 137. 1847. Affirmed, 2 Comst. N. Y. 235. 1849.

§ 6. Where loss was occasioned by lightning; *Held*, that the usage of other companies, restricting their liabilities to losses occasioned by actual burning by lightning,

might be proved to show that the general usage of insurance companies was not to be liable for damage by lightning, unless accompanied by burning. *Babcock v. Montgomery County Mut. Ins. Co.*, 6 Barb. N. Y. 637. 1849. Affirmed, 4 Comst. N. Y. 326. 1850.

§ 7. Insurers are assumed to know the usage of trade; and when they use a term, having a limited meaning in the trade, and in a policy to one engaged in that trade, or in a business closely connected with it, both parties must be assumed to have understood the term in the sense in which the trade usually understand it. Evidence of such usage is always admissible. *Wall v. Howard Ins. Co.*, 14 Barb. N. Y. 383. 1852.

§ 8. The evidence of a director, as to the practice of the company in giving consent to other insurance, is immaterial. The practice of the company, so far as within the knowledge of such director, could not bind the assured; to be binding, the practice must be such and so known to the parties as to lead to the belief that the contract was made with reference to it. *Goodall v. New England Mut. Fire Ins. Co.*, 5 Fost. N. H. 169. 1852.

§ 9. Assured, in his application for insurance on a factory, in reply to the question, "Are there casks in each loft constantly supplied with water?" stated, "There is in each room, casks of forty-two gallons each kept constantly full." It appeared that one of the stories of the factory was partitioned into apartments, and that there was not a cask in each apartment. Evidence was held to be admissible to show that by the usage of manufacturers, the word "room" designated an entire loft, whether partitioned or not. Insurance companies, in dealing with such manufacturers, are bound by such usage, and the legal presumption is that they have knowledge of the same. *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. Mass. 416. 1853.

§ 10. In an action upon a policy of insurance, evidence of a local custom amongst insurers, not communicated to the insured, or of such notoriety as to afford any presumption of knowledge on his part, is not admissible. *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. (22 Ohio) 452. 1853

§ 11. To recover against a consignee of goods which have been burnt while in his possession, and not insured by him, it must be made to appear by the most conclusive proof, that it is the custom for commission merchants to insure goods consigned to them for sale, unless instructed to the contrary. *Tonge v. Kennett*, 10 La. An. 800. 1855.

§ 12. Where to an inquiry in the application whether there was a watchman in the building during the night, the assured answered, "There is a watchman nights," the reply must be understood to mean that there was a watchman every night. The language used is to be interpreted according to its popular meaning; and cannot be controlled by evidence of a local custom as to keeping watchmen in such buildings on Sunday nights. *Ripley v. Ætna Ins. Co.* 30 N. Y. 136. 1864.

§ 13. Notwithstanding the charter of an insurance company requires their contracts of insurance to be executed in a particular mode, yet if they adopt a different mode, and receive the benefit of the contract, they will be bound by it. *N. E. Fire & M. Ins. Co. v. Schettler*, 38 Ill. 166. 1865.

See Agent, § 68. Damages, 17. Evidence, 36, 49, 79. Parol Contract, 14. Parol Evidence, 9. Use and Occupation, 24. Watchman, 3. What Property is Covered by Policy, 13.

USE AND OCCUPATION.

§ 1. A coffee house is not an inn, within the meaning of a policy reciting that the trade of inn-keeper is one of the double hazardous trades, which avoid the insurance, unless specially referred to and premium paid accordingly. *Doe d. Pitt v. Laming*, 4 Camp. N. P. 73. 1814.

§ 2. A house was insured for \$1,200; and after death of assured, but during term of policy, the administrators proceeded to repair the house thoroughly; in the course of which repair, being untenanted except by the workmen with their benches and tools, the house was destroyed by fire, by act of incendiarism. *Held*, that by insuring, the assured had not relinquished the right of exercising the ordinary and necessary acts of ownership over their houses, and that the insured might therefore, the policy being silent on the subject, make not only ordinary repairs, but such a thorough repair as to render the house tenantable in the mode commonly pursued on such occasion. But if by gross negligence or misconduct of the workmen employed, a fire ensue, or if alterations be made in the subject insured, materially enhancing the risk, and not necessary to the enjoyment of the premises insured, or according to usage and custom were not the result of the exercise of such ordinary acts of ownership, as in the understanding of the parties were conceded to the insured at the time of the insurance; and a loss by fire is thereby produced; then the assured cannot recover. *Held*, further, that all these questions were to be determined by the jury and not by the court. *Jolly v. Baltimore Equitable Society*, 1 Harris & Gill, Md. 295. 1827.

§ 3. Policy was on "building occupied as a manufactory of hat bodies and on the privilege for all the process

of said business." The policy provided that "an appropriation or use of the premises, for any business, trade, or vocation denominated hazardous, extra hazardous, &c.," without consent, should avoid the policy, so long as the premises were so used. Among the classes of extra hazardous were enumerated "carpenters in their shop, houses, building or repairing;" and it was shown that a room in the premises insured had been used for repairing machinery, necessary to the business, by a carpenter. *Held*, that such use was within the written privilege, "for all the process of manufacturing hat bodies," and did not, therefore, avoid the policy. *Lounsbury v. Protection Ins. Co.* 8 Conn. 459. 1831.

§ 4. The policy prohibited the use of the premises for any business or vocation specified in the memorandum of hazards. The business of a "grocer" was not therein mentioned. *Held*, that it was not, therefore, a prohibited trade, and might be carried on in the usual manner, and if "oils and spirituous liquors," were necessary incidents to the trade of a grocer, they might be kept upon the premises, although they were specified among the enumeration of prohibited articles. *New York Equitable Ins. Co. v. Langdon*, 6 Wend. N. Y. 623. 1831.

§ 5. These words of description in a policy of insurance, "now occupied as a dwelling house, but to be hereafter occupied as a tavern, and privileged as such," are not a warranty of the assured that it should be at all times during the risk occupied as a tavern; but a license or privilege granted by the company, that it might be so occupied. *Catlin v. Springfield Fire Ins. Co.* 1 Sumner, C. C. U. S. 434. 1833.

§ 6. Although a night auction is not included in the schedule of hazardous employments, yet if the issue presents the question, whether a night auction is more hazardous than a dry goods store, the jury must find upon it from the evidence before them. *Harris v. Protection Ins. Co.*, Wright, Ohio, 548. 1834.

§ 7. Policy on cotton mills, gear, steam engine, &c., recited that the "buildings were brick, &c.; warmed, &c.; worked by the steam engine above mentioned, in tenure of one firm only, standing apart from all other mills and worked by day only." *Held*, that the "worked by day only," referred to the mills, and that it was no breach of the policy that the engine was kept going by night, and some parts of the machinery were turned by it; the cotton mill being worked by day only; and that a plea, setting up, as a breach of the policy, that the steam engine was worked, was bad, and the plaintiff was entitled to judgment. *Whitehead v. Price*, 2 *Cromp. Mees. & Ros. Exch.* 447. 1835. Same case, 1 *Gale*, 151. Same case, 5 *Tyrwhitt*, 825.

§ 8. Policy on house, "and also a kiln for drying corn in use." Third condition provided that policy should be void in case of misrepresentations in the description of the premises: and the sixth condition avoided the policy in case of change in the business carried on, without notice to the company. The proof was, that a vessel laden with bark sunk near the premises, and the assured allowed the bark to be dried, gratuitously, at his kiln, and this caused the fire. *Held*, that the case was not within the third condition, for that related to the time when the description was made, and it was correct; nor within the sixth, for that related to a permanent, or habitual alteration in the business; and judgment was rendered in favor of assured. *Shaw v. Robberds*, 6 *Adolph. & Ellis*, 75 (33 *E. C. L.* 12). 1837.

§ 9. Policy, on machinery of certain cotton mills, "warranted that they be warmed and worked by steam, lighted by gas, and worked by day only." Plea, that parts of said mills, to wit: a certain steam engine and certain upright and horizontal shafts were worked by night, is bad. It should have alleged that the mills were worked by night, under which the question might be made before the jury, whether the proof supported the allegation. It

might be that the parts mentioned were worked, and the mills not be worked, within the meaning of the policy. *Mayall v. Mitford*, 6 Adolph. & Ellis, 670. (33 E. C. L. 170.) 1837.

§ 10. This insurance was on the undivided half of a paper mill, and of the machinery therein. Afterwards the rag-cutter and duster were displaced, and a pair of mill-stones for grinding grain were substituted, but the building and machinery in other respects remained unchanged. The fire arose from a cause other than the change in occupation. The policy contained a description of risks in classes denominated hazardous, extra hazardous, and those mentioned in a memorandum, which would be insured at special rates, and in this memorandum were mentioned grist mills and paper mills. It also contained a condition that the insurance should be void if the building insured should be put to a use denominated hazardous or extra hazardous. *Held*, 1st, that the contract amounted to a warranty that the building should continue to be a paper mill, but that by the introduction of the mill-stones the character of the building was not changed; it was a paper mill still; 2d, that, admitting the use of the mill-stones to have increased the risk, as the policy had expressly provided that putting the building to a use denominated hazardous or extra hazardous should avoid the insurance, and had not provided for any such consequences, when the building is put to a use described in said memorandum, it could not have been the intent of the contract that use of the building for the purposes mentioned in the memorandum should affect its validity; and as the fire in this case arose from a cause within the risk as originally taken, assured was entitled to recover. *Wood v. Hartford Ins. Co.*, 13 Conn. 534. 1840.

§ 11. Keeping a bar-room in a boarding-house for retailing liquors to boarders, does not violate a provision in the policy prohibiting "tavern keeping." *Rafferty v. New Brunswick Fire Ins. Co.*, 3 Harrison, N. J. 480. 1842.

§ 12. Building, insured as a "dwelling-house," may be afterwards occupied as a "boarding-house," if "boarding-houses" are not enumerated in classes of hazards, or otherwise prohibited. *Rafferty v. New Brunswick Fire Ins. Co.*, 3 Harrison, N. J. 480. 1842.

§ 13. The owner of a house, which has been insured, has a right to have it occupied by any one he pleases; provided the occupation of such persons, or the property placed in the house, is not of a nature to vitiate the policy, under the condition relative to the hazardous or extra hazardous risks. *Lyon v. Commercial Ins. Co.*, 2 Rob. La. 266. 1842.

§ 14. The policy provided that in case the building should be appropriated, applied or used to or for the purpose of carrying on or exercising therein any trade, business or vocation, denominated hazardous, extra hazardous, or specified in the memorandum of special rates, the policy should be of no effect, so long as the building should be so used. The memorandum referred to, specified "houses building or repairing." *Held*, that these words taken in connection with the provision of the policy, related to carrying on the trade or occupation of house building or house repairing in or about the building insured, and not to the repairs of the particular building itself; it was the appropriation of the building to these purposes, that the policy prohibited, and that under it assured might make all necessary repairs without avoiding his policy. *Grant v. Howard Ins. Co.*, 5 Hill, N. Y. 10. 1843.

§ 15. On general principles (in the absence of any stipulation in the policy on the subject), a policy is not avoided by an alteration in the trade carried on upon the premises; and a condition, requiring the insured "to communicate any circumstance, which is material to be made known, to the company, to enable them to judge of the risk they have undertaken," has reference to the time when the policy was effected, and does not apply to what may

take place afterwards. *Pim v. Reid*, 6 Man. & Grang. 1. (46 E. C. L. 1.) 1843. See comments on this case in *Silem v. Thornton*, 3 Ellis & B. 868.

§ 16. Where application, which was made part of the policy, described the premises insured as occupied for a "grist mill," and it was proved to have been also occupied for "carpenter's work;" *Held*, to be a warranty as to occupation, breach of which avoided the policy. *Jennings v. Chenango County Mut. Ins. Co.* 2 Denio, N. Y. 75. 1846.

§ 17. Plaintiff in his application, which was referred to and made part of the policy, described building as occupied by several tenants for certain purposes. In 1843, when the policy, issued upon this application, was about to expire, he made application for further insurance upon same premises, and wrote in the application for the second insurance, "For particulars relative to the description of the brick store, reference is had to my application for policy, No. 12018," which was the first application. This last application was also referred to and made part of the second policy. At date of the second application and policy, the occupations were different, and, as appeared, by agreement of the parties themselves, more hazardous than at date of first insurance. *Held*, that the statements of the occupation of the premises in the application were merely representations, and not express warranty; and that the plaintiff was bound by them no further than they were material; and the materiality of such representations was to be determined by the jury. *Boardman v. New Hampshire Mut. Fire Ins. Co.* 20 N. H. 551. 1847.

§ 18. The premises insured were described as "occupied by G., as a private dwelling." *Held*, that this was an affirmative stipulation that the house was then occupied by G., but not a promissory agreement that he should continue to occupy it; and assured might recover, although the house had been vacated before, and was yet vacant at

the time of the fire. *O'Neill v. Buffalo Fire Ins. Co.* 3 Comst. N. Y. 122. 1849.

§ 19. This policy was on certain barns, and contained the following statement: "All the above described barns are used for hay, straw, grain unthreshed, stabling, and shelter." *Held*, that these words were descriptive, and not a warranty that the barns should be used only in the manner described; that assured had the right to use his barns in the ordinary way; and that for assured to mix and keep paints in his barn, while painting his house, was an ordinary use of the same among Connecticut farmers. *Billings v. Tolland County Mut. Fire Ins. Co.* 20 Conn. 139. 1849.

§ 20. A mere change in the occupation of a house insured against fire, without notice, &c., there being no other alteration in the manner or purpose of occupation, will not avoid a policy of insurance effected under the provisions of the act 6 Wm. IV, Ch. 18, incorporating the Wellington District Insurance Company. Nor is a lease of the house insured for one year, "an alienation" within the act. *Hobson v. Wellington District Ins. Co.* 6 Upper Canada, Q. B. 536. 1849.

§ 21. In an insurance upon a house in process of building, a statement, in reply to inquiry, that there are no stoves in it, must be understood to mean that no stove is to be habitually kept and used in it, as stoves are ordinarily used in a dwelling house. The use of a stove for a few days, subsequent to the effecting of the insurance, and for a purpose connected with the finishing of the house, is not a violation of the warranty. *Williams v. New England Mut. Fire Ins. Co.* 31 Me. 219. 1850.

§ 22. Where assured's tenant had a fire among some chips under a wood house, and adjoining the tavern, being the buildings insured, for the purpose of extracting grease

from spoiled meat, and the policy contained a provision that the premises should not be used for "the purpose of carrying on therein any trade or business denominated hazardous or extra-hazardous, &c., which would increase the hazard, without the consent of the insurer;" *Held*, that the said provision pointed only to a permanent alteration in the business, and as the act done was a mere temporary affair, it did not avoid the policy, though it might, and probably did, increase the risk. *Gates v. Madison County Mut. Ins. Co.* 1 Seld. N. Y. 469. 1851.

§ 23. The use of a room for the drawing of a lottery in a building insured as a "shoe manufactory" with permission of the assured, will not, in the absence of any prohibition in the policy, avoid the policy either on building or on stock, although the drawing of such lottery was an unlawful act. *Boardman v. Merrimack Mut. Fire Ins. Co.* 8 Cush. Mass. 583. 1851.

§ 24. There is no rule of law or usage, which requires the owner of an untenanted house to have it guarded by a keeper, to enable him to recover his insurance in case of a loss of the building by fire. *Soye v. Merchants' Ins. Co.* 6 La. An. 761. 1851.

§ 25. Where a policy described insured property as occupied by a certain individual, a change of tenants, there being no provision in the policy prohibiting it, will not avoid the policy, though the first tenant may be a carefully prudent, and the second a grossly negligent one. *Gates v. Madison County Mut. Ins. Co.* 1 Seld. N. Y. 469. 1851.

§ 26. Where policy was for "\$2,000 on their stock as rope manufacturers contained in their brick building with tin roof occupied as a store house, and situate," &c., and no written application had been made, and it was in proof that a part of the building was used for hackling

hemp and spinning it into rope yarns; *Held*, that the description "occupied as a store-house," was a warranty that the building was occupied as a store-house only, and the additional occupation, therefore, avoided the policy. *Wall v. East River Mut. Ins. Co.* 3 Seld. N. Y. 370. 1852.

§ 27. Where policy was for \$1000 on brick warehouse on Water Street between Morgan & Green Streets in block 15 Saint Louis, "to be occupied as three stores, but not as Coffee Houses;" and subsequent to execution of the policy, and before and at time of the fire, one of the tenements was used as a coffee-house, though the fire originated in another tenement; *Held*, that the words, "not to be used as Coffee-Houses," were equivalent to a warranty that the premises should not be used for that purpose, and the plaintiff could not recover. *Lawless v. Tennessee Marine & Fire Ins. Co.* Ct. Ct. St. Louis, Mo. 1852. Cited in *Angel on Fire & Life Ins.*, note 2, to § 169.

§ 28. A policy of insurance was on his brick dwelling and stores, and no other description of the building or business to be carried on therein; and in the printed body of the policy it was stipulated, that, "if these premises shall hereafter be appropriated, applied or used, to or for the purpose of carrying on therein any trades, business or vocations denominated hazardous, extra hazardous, &c., then, and so long as the premises shall be so applied or used, this policy shall cease and be of no force and effect." In an action on the policy the defendant offered to prove that one of the stores was occupied for a grocery, and contained hazardous and extra-hazardous articles, but the evidence was not admitted; *Held*, that in the exclusion of such evidence there was error on the part of the court below, and that the above provision in the policy was a prospective warranty, and as obligatory on assured as if it had been retrospective or concurrent; and that a breach of it would avoid the policy, although the fire was not occasioned by it, though it was unknown to the assured, and although the business had not been changed from

what it was at the time of making the policy. *Mead v. Northumberland Ins. Co.* 3 Seld. N. Y. 530. 1852.

§ 29. The application was made part of the policy, and a warranty on the part of the assured. In answer to the question as to occupation of the building, assured replied, "formerly used as a machine shop, all of which business is now stopped, and shop fastened up, and only used for the purpose of the meeting of the band two evenings of the week on the second floor." After the insurance, the building was used for other purposes, which use was set up in defense, as a breach of warranty; *Held*, that the answer of assured related only to the condition of things at the time of the insurance; and as the company had guarded against any "increase of risk" by an express condition in the policy, that to give effect to both clauses in the contract, the warranty as to occupation must be construed as affirmative only, and not intended to apply to the future condition of the property. *Blood v. Howard Fire Ins. Co.* 12 Cush. Mass. 472. 1853.

§ 30. The insurance was on "hay and grain, live stock, carriages, &c., in a barn * * * occupied by the applicant as a tavern barn." The conditions annexed were made part of the policy. One of them required the assured to state in his affidavits of loss, "that there has been no alteration or occupation of said premises (not assented to by the company) which increased the hazard of said property, since the insurance was effected." Subsequent to the insurance, the assured permitted another party to keep a "livery stable" in a part of the barn, which occupation was continued to time of the fire. The referees found that an occupancy of the barn for this purpose was not such a change in the use of the premises as to materially increase the risk, basing such decision on the ground that the occupation of the building as a livery stable was not to interfere with assured's right to occupy the whole stable as a "tavern barn," and that assured had a right to turn out the tenant at pleasure. There was

evidence given before the referees, by three insurance agents, that such occupation of the building made one-half of one per cent. more in the rates of insurance charged. On motion to set aside report of the referees; *Held*, that the referees erred in holding that the keeping of the livery stable on the premises was not such a change in the use of the premises as materially increased the risk; and that they also erred in holding that the fact of the owner of the livery stable being but a tenant at will, prevented his use of the premises being in law an occupation that rendered the policy void. *Hobby v. Dana*, 17 Barb. N. Y. 111. 1853.

§ 31. Policy on stock of cabinet maker with condition that, in case of any alteration of building containing the property insured, or of any steam, steam engine, &c., being introduced, without being notified to the company and endorsed on the policy, no benefit will arise to the insured on the policy in case of loss. The insured erected a brick furnace or boiler, to which he attached a steam engine to try whether it was worth his while to buy it, and built a fire once, giving no notice to the company. *Held*, that the policy was avoided, and that it made no difference whether the engine was used by way of experiment, or as a mode of carrying on business, or whether it was used for a longer or shorter time. *Glen v. Lewis*, 8 Wels. Hurlst. & Gord. Exch. 607. 1853.

§ 32. A policy of insurance upon stock of goods, described as being in a certain store occupied by the assured, provided that in case of any alterations in or about the premises materially increasing the risk, without notice thereof to the company, the policy should be void; but that no alterations, "not within the control of the assured" should affect the insurance. The goods having been seized on execution, the sheriff proceeded to sell the same at auction, in the same store, and whilst thus selling, the fire originated. No notice of such sale had been given to the company; *Held*, that the occupation of the premises

for the purpose of selling out at auction, was a use "within the control of the assured" within the meaning of the by-law; but whether such use increased the risk, was a question to be determined by the jury. *Rice v. Tower*, 1 Gray, Mass. 426. 1854.

§ 33. A house insured was described as a "dwelling house," when in fact it was a bawdy house, the keeping of which was not by the terms of the policy prohibited or mentioned. The fire was occasioned by a mob destroying the furniture and setting fire to the building, and assurers set up in defense that this was such a concealment of the occupation as avoided the policy. *Held*, that in determining the materiality of the fact suppressed, only the natural consequences of the use to which the house was applied were to be regarded; and if the use to which it was applied enhanced the risk, and the destruction by fire was the natural consequence of such use, the insurers were not liable, but that acts of lawless violence were not the natural consequences of the use of a building as a bawdy house. *Loehner v. Home Mut. Ins. Co.* 17 Mo. 247. 1852. *Loehner v. Home Mut. Ins. Co.* 19 Mo. 628. 1854.

§ 34. Under policy on "a pail factory, chair shop, saw mill, and store houses connected," the use of a part of the pail factory for a "grist mill," avoids the policy, under condition "that if the premises be appropriated, applied or used to or for the purpose of carrying on therein any trade, business or vocation, enumerated in the classes of hazards, without notice and consent of company, then, and so long, this policy shall cease," "grist mills" being one of the forbidden occupations. *Lee v. Howard Fire Ins. Co.* 3 Gray, Mass. 583. 1854.

§ 35. A policy of insurance on their "lumber, lime, nails and lead in their two stores on their wharf at Weymouth," provided that whenever the circumstances disclosed in any application shall become so changed as to

increase the risk, the policy shall be void, unless notice be given to the company and an additional premium paid. Subsequent to the insurance, a vessel was wrecked in front of assured's stores, and the seamen being wet and cold, assured gave them permission to sleep in the counting room of one of the stores for that night, but expressly forbid them to make any fire in the stove, as the funnel in the loft was in an unsafe condition. Contrary to his orders, the seamen made a fire in the stove, in consequence of which the building was destroyed. *Held*, that the occupation of the building, with assent of assured, for a resting place for a single night for the seamen, was not such a change of risk, within the meaning of the condition, as to avoid the policy; nor did the building of the fire in the stove, contrary to the express order of assured, furnish any defense against the assured's claim; it being a wrongful act of third persons, for which the company were liable, in the same manner and to the same extent, as if those persons had unlawfully broken into the counting room, and burned the building by kindling a fire on the floor. *Loud v. Citizens' Mut. Ins. Co.* 2 Gray, Mass. 221. 1854.

§ 36. The occupation of a portion of an unused flour mill, by the owner, for some three months, engaged in coopering as the demand served, in violation of the conditions and by-laws annexed and made part of the policy, (and which provided that such appropriation to other purposes, increasing the risk, should *ipso facto* avoid the policy), avoids the policy; and when it is shown that such forbidden trade was actually carried on, the breach of the by-laws and conditions is complete, although the trade was not carried on for such a length of time as to become "permanent or habitual." *Harris v. Columbiana Mut. Ins. Co.* 4 Ohio St. 285. 1854.

§ 37. In the application for insurance, which by express reference was made part of the contract, was this question: "For what purpose is the building occupied, and by whom?" Answer: "As a hotel, by Mr. Holmes."

At bottom of the application assured stipulated that the above was a full, just and true exposition of all the facts regarding the risk "so far as the same are known to the applicant." The policy provided that a false description by the assured, of a building, as to its occupancy, value, &c., should avoid the policy. The building insured was in fact occupied as a house of ill fame, and company contended that there was a breach of warranty as to the occupation of the building, and this whether the assured knew of such occupation or not. *Held*, that the building being leased as a hotel, and apparently occupied as such, the fact of its being used as a house of ill fame by the tenant, without the knowledge or consent of the assured, would not prevent a recovery. *Hall v. People's Mut. Fire Ins. Co.* 6 Gray, Mass. 185. 1856.

§ 38. Where policy stipulated against an appropriation or use of the premises for any of the purposes enumerated in the classes of hazards, among which were "mills, manufactories or mechanical operations requiring fire heat:" *Held*, that if the use of a corn meal mill in connection with a fire kiln for drying corn meal was not a known or usual incident or an appropriate part of the ordinary business of a "steam flouring mill," the introduction of such a business into a flouring mill insured, was a breach of the consideration of the policy, and rendered it inoperative. *Washington Mut. Ins. Co. v. Merchants' & Manufacturers' Ins. Co.* 5 Ohio St. 450. 1856.

§ 39. Policy for \$1,500 was taken out on store goods, and in application, which was copied into policy, assured said, among other words of description, "clerk sleeps in store." For two months or more before the fire, the clerk did not sleep in the store, nor was he sleeping there the night of the fire. *Held*, that those words, standing in the collocation of descriptive terms, were mere descriptions of occupancy, and not a warranty for the future. *Frisbie v. Fayette Mut. Ins. Co.* 27 Penn. St. 325. 1856.

§ 40. Where policy provided, "that whenever any alteration shall be made in any building insured, which increases the risk or hazard of the same, so as to increase the rate, such alteration shall avoid the policy, unless the assured give an additional premium according to the rate of exposure. This company will not be responsible for any loss that occurs by fire in consequence of repairing, finishing, or building additions, to any building insured in this company;" *Held*, that if the evidence showed that the building, when insured, was in an unfinished state, and was in the process of being finished, and the use of a stove for the purpose of drying the plastering was for a temporary purpose, and not for a permanent change of the business or purpose for which the house was built and insured, to wit: "A tavern and dwelling-house," there was nothing in the condition which for that reason avoided the policy. *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 20. 1856.

§ 41. Where three adjoining houses were insured in one policy, for a specified sum on each, and one of them, which at time of insurance was occupied as a shoe store, was afterwards without the knowledge or consent of the insurers changed into a grocery store, in which gunpowder was kept, and from an explosion of which all the houses were injured, the conditions annexed to the policy requiring "groceries and gunpowder" to be specified and pay a higher rate of premium or policy should be void; *Held*, that the change of occupation and keeping of gunpowder avoided the policy; and that the contract was entire, and there could be no recovery for the injury to any of the houses, although the assured did not know that gunpowder was kept by his tenant in the house. *Fire Association of Philadelphia v. Williamson*, 26 Penn. St. 196. 1856.

§ 42. In an action on a policy of re-insurance for \$4,000, on "stock of flour, grain and cooperage, contained in their stone and brick steam flouring mill," where policy provided against an appropriation or use of the premises for any of the purposes mentioned in the "classes of haz-

ards," and in which were enumerated "mills, manufactories and mechanical operations requiring the use of fire heat;" *Held*, that the question, whether the use of a fire kiln for drying corn in connection with a corn meal mill, as well as the question, whether the use of a corn meal mill itself was incident to or an ordinary and appropriate part of the business of a "steam flouring mill," were matters of fact proper for determination by the jury and not by the court. *Washington Mut. Ins. Co. v. Merchants' & Manufacturers' Mut. Ins. Co.* 5 Ohio St. 450. 1856.

§ 43. Plaintiff insured with defendants for £2,000, the property insured being described in his application as his stock of dry goods contained in the first and second floors of a three story building occupied by him as a dry goods store, the third story being occupied by another party as a dwelling and architect's office. By the policy the insured covenanted that the representations made in the application were true, and that if otherwise, the policy should be void; and it was agreed that if the building should, during the insurance, be used for any trade or business denominated hazardous, extra hazardous, or specially hazardous, in the memorandum annexed to the policy, or for the purpose of keeping or selling any of the goods so denominated, unless agreed to in writing by the company, the policy should be void. The policy was also subject to certain conditions; amongst which were, that the application for insurance should specify the construction of the building to be insured or containing property to be insured, and by whom occupied; that it should be stated whether the goods insured were or not of the descriptions denominated hazardous, extra hazardous, or included in the memorandum of special rates; that if after the insurance was effected, the risk should be increased by any means within the control of the assured, or if such building should be occupied in any way so as to render the risk more hazardous than at time of insuring, such insurance should be void. In the memorandum referred to, hat finishers and sulphur were included among the trades and goods deemed hazard-

ous, and which it was stipulated should subject the building and all its contents to an additional charge; hat-bleaching was included in the class called extra hazardous, and hat manufacturers in that of extra hazardous (each with the same stipulation as to extra charge), and at the end of the last class was added, "and generally all trades requiring the use of fire heat not before enumerated." The policy had been renewed several times before the occurrence of the loss, always under the original representation. It appeared that the goods kept by the plaintiff consisted in part of millinery, which in defendants' printed instructions to their agents, was classed as extra hazardous, and ordered to be charged at a higher rate; but it was not mentioned in the policy or conditions. Also, that the business of bleaching straw bonnets was carried on in the third story (described in the policy as occupied for an architect's office and dwelling), and a stove introduced into the cellar for the purpose of this process, in which sulphur was also made use of. No notice was given to defendants of any of these changes. A fire occurred, and an action having been brought, the jury found for the plaintiff. On motion for a new trial; *Held*, that the policy was avoided—that bleaching bonnets was included in the trade of "hat-bleaching," mentioned in the class "extra hazardous," and that the plaintiff having carried on that business without notice to defendants, no question as to the increase of risk thereby was left for the jury, but the policy, by the express terms of it, was at an end; that the other conditions were broken, for the occupation of the building was altered, and the risk increased by means within the control of the assured. The keeping of millinery would not have been fatal, for plaintiff could not be supposed to be aware of defendant's instructions to their agents; nor would the use of sulphur, for the memorandum referred to it only when kept as stock. *Merrick v. Provincial Ins. Co.* 14 Upper Canada, Q. B. 439. 1856.

§ 44. Policy on a boiling house, &c., being a special

risk. Policy recited, "no steam engine employed on the premises, the steam from said boiler being used for heating water and warming the shops." Condition, that in case the risk shall be increased by any alteration of circumstances, without notice to the company, the insurance should be void. Afterward the insured put up a steam engine, without notifying the company, and subsequently the fire occurred; but not because of the steam engine; and the jury found that the steam engine did not increase the risk. The Court of Exchequer held that the policy was avoided, which was reversed in Exchequer Chamber, and the insured held entitled to recover. *Stokes v. Cox*, 1 Hurl. & Norm. Exch. 320, 533. 1856.

§ 45. A description of a house in a policy of insurance as "occupied by" the insured, is a description merely, and is not an agreement that the insured should continue in the occupation of it; and if vacant at time of fire, policy will not be void. *Joyce v. Maine Ins. Co.*, 45 Me. 168. 1858.

§ 46. By conditions of the policy, "camphene, pine oil, and friction matches," were prohibited being kept, used or sold in the building insured, or in any building containing goods insured, without the special consent of the company in writing on the policy." *Held*, that such condition was not violated by a casual use of camphene or "friction matches," by the workmen employed in the building, contrary to the orders of the assured; 2d, that the use of camphene and matches, contemplated in such clause, must be a use by authority, express or implied, of the insured; a known and permitted use; that if the assured knew, however, or as prudent men ought to have known of such use, mere orders to the contrary would not avail them; nothing short of an enforced prohibition would have saved the policy; and if such use was habitual, the law imputes to the assured knowledge and permission. *Farmers & Mechanics' Ins. Co. v. Simmons*, 30 Penn. St. 299. 1858.

§ 47. Policy of \$400, on "printing press in frame building," &c., provided "that if the premises above mentioned shall at any time, when such fire shall happen, be in whole or in part occupied for purposes considered hazardous, unless liberty so to occupy them be expressly stipulated for, this policy and every clause, article and thing therein contained, shall be void and of no effect." One of the conditions also provided, "if any alterations which tend to increase the risk, shall be made in any building or buildings insured by this company, such alterations shall be reported," &c. In the conditions of policy there were no enumerations of "hazardous" articles, as are usually contained in other policies. Subsequent to the insurance the press was removed to a brick building, and consent of the company thereto endorsed on back of the policy. To the brick building to which the press had been removed, additions of a steam engine, cupola, furnace, and foundry, were subsequently put up in a frame building immediately adjoining and back of the brick building, and in which the fire originated that destroyed the press insured. *Held*, that the condition as to "alterations" had exclusive reference to buildings insured, and had no application to the subject-matter of this insurance; but that the "proviso" applied to contents as well as to buildings, and in this case applied not only to the original building in which the press was insured, but also to that to which it had been removed; and any occupation of such building in violation of such "proviso," would avoid the policy on press; that although there were no classes of hazards in the policy, yet the additions above referred to were evidence of an increase of risk, such as was forbidden by the proviso; and that, in absence of any stipulation whatever against an increase of risk, good faith required the assured, if he exposed the property to risk far more hazardous than could have been contemplated by the insurers, to notify them of the change, and a neglect to do so might be considered evidence of gross negligence, that would avoid the policy. *Robinson v. Mercer County Mut. Fire Ins. Co.*, 3 Dutch. N. J. 134. 1858.

§ 48. Under the clause of a fire policy, making it void if any unauthorized hazardous trade, increasing the risk, should be carried on in the building, the fact that such trade was carried on, avoids the policy; no matter what was the cause or origin of the fire, or that such trade was carried on by the tenant of the assured, without his knowledge or consent. *Howell v. Baltimore Equitable Society*, 16 Md. 377. 1860.

§ 49. The application and conditions annexed were referred to and expressly made part of a policy on a "stock of merchandise." In the application were these questions and answers, to wit: "For what purpose is the building used? Answer. "Wholesale and retail hardware." "How many tenants?" Answer. "One." Upon the trial it was shown that the agent of the company had, a few days previous to this insurance, surveyed the property for another party, and, in this instance, had filled up the application, obtaining the assured's signature thereto. It was also shown that the answer, with reference to the occupancy of the building, was untrue in that it was also occupied for a "clothing store," in the second story, and for a number of lodging rooms in the upper story. At the bottom of the application was this clause: "and the assured hereby covenants and engages that the representation, given in the application for this insurance, is a warranty on the part of the assured, and contains a just, full and true exposition of all the facts and circumstances in regard to the condition, situation and value of the property insured, and if facts or circumstances shall not be fairly represented, &c., then the policy to be void." In the body of the policy the insurance was declared to be on the following property, "as described in the application and survey No. 14, which is hereby declared a part of this policy and a warranty on the part of the assured." *Held*, that so far as the representations related to the property insured, they must be true, or the policy would be void; but that a false representation as to something outside of and inde-

pendent of, the property insured, and which had not in any degree contributed to the loss, would not have that effect; and as the above clauses, both in application and policy, related only to the stock insured, and the representations in respect to that were admitted to be true, the false representation as to occupancy of the building, which was not insured, did not avoid the policy. *Howard Fire & Marine Ins. Co. v. Cornick*, 24 Ill. 455. 1860.

§ 50. Insurance on premises described in policy as "the five story brick building and the three story brick addition known as the Lawrence Block, occupied for stores below, the upper portion to remain unoccupied during the continuance of the policy. *Held*, that there was an affirmative warranty, as to the lower part, that it was occupied for stores at the time of effecting insurance; and that there was a promissory warranty, as to the upper part, that it should remain unoccupied; but that there was no warranty, as to the lower part, that it should continue to be occupied for stores. *Stout v. City Fire Ins. Co. of New Haven*, Supreme Court, Iowa, June Term. 1861.

§ 51. A by-law of a mutual company provided, that if during life of policy, the premises should be altered so as to be used in carrying on "any trade, business, or vocation which, according to the by-laws and conditions, classes of hazards or rates thereto annexed, would increase the hazard," without the consent of the company, in writing, it should avoid the policy. In an action on such policy the defendants averred, that the plaintiff had leased the house, and that at time of its destruction it was unoccupied, and that this change was made without their consent, increased the risk, and therefore avoided the policy. *Held*, that when the premises became vacant by reason of a tenant leaving them, it was not devoting them to a "trade, business, or occupation," which increased the hazard; and if there were anything in the by-laws or conditions, which prevented the owner from leasing the premises, or from leaving them unoccupied, the answer should have averred

it. *Hawkes v Dodge County Mut. Ins. Co.* 11 Wis. 188. 1860.

§ 52. The application contained the following interrogatory: "How are the several stories occupied?" which applicant had answered as follows: "Unoccupied, but to be occupied by a tenant." The policy provided that "when a policy is issued on a survey and description of the property, such survey and description shall be deemed to be a part of the policy, and a warranty on the part of the assured." *Held*, that the first part of the assured's answer, "unoccupied," was a full and complete response to the inquiry, and that the second part, "but to be occupied by a tenant," was not to be considered as a warranty that the house should be occupied by a tenant, but as a reservation on the part of the applicant of the right to have it so occupied, and to avoid the inference that it was to remain unoccupied. But even if regarded as a warranty, yet, as no time was specified when such occupancy was to commence, the warranty would not be broken if such occupancy was procured within a reasonable time; and what was a reasonable time, was a question properly for the jury. *Hough v. City Fire Ins. Co.* 29 Conn. 10. 1860.

§ 53. Where a policy is silent in reference to the use of premises adjoining those insured, and there has been no representation or suppression of any fact relating to the subject-matter, the insured has the same right to use his adjoining property, and is governed by the same obligations in respect to its use, as any other owner would be. *Miller v. Western Farmers' Mut. Ins. Co.* 1 Hand. Ohio, 208. 1854.

§ 54. The occasional use of articles denominated hazardous, or the occupation of the premises insured for purposes called hazardous in the conditions annexed to a policy, will not avoid the policy if such an occupation was connected with the buildings insured. There must be a direct appropriation of the property to such use or purpose

before the covenant is broken. And if, during such occasional or temporary use, the property should be destroyed, the underwriters will still be held if there is no fraud on the part of the insured. *Merchants' & Manufacturers' Mut. Ins. Co. v. Washington Mut. Ins. Co.* 1 Hand. Ohio, 408. 1855.

§ 55. In his application for insurance, to the question, *Who occupies the building?* the owner answered, "Will be occupied by a tenant." *Held*, in a suit on the policy to recover for loss, that the answer was not a stipulation that the building should be so occupied, but was rather the representation of his expectation that it should be occupied by a tenant, and not by himself. *Herrick v. Union Mut. Fire Ins. Co.* 48 Me. 558. 1860.

§ 56. Where the form of an application for a fire policy as prescribed by the company contains a question to be answered by the applicant as to the mode in which the building offered for insurance is to be occupied, and the agent of the insurance company is informed by the applicant of the intended mode of occupation, but fills out the application without inserting any answer to that question, the company, by issuing the policy without such answer, waives it, and cannot afterwards object to any use of the premises of which the agent was fairly notified. *Otherwise*, where the agent has knowledge only that the building has been at some previous time used for a hazardous business, but does not know that it is being used in that manner at the time of the application, or that it is the custom or intention of the applicant so to use it. *Dodge County Mut. Ins. Co. v. Rogers*, 12 Wis. 337. 1860.

§ 57. A policy contained the condition that "unoccupied premises must be insured as such. Houses, barns, or other buildings insured as *occupied* premises or on occupied premises, the policy becomes void when the occupant personally vacates the premises, unless immediate notice be given to this company and additional premium paid." The policy was silent as to the occupancy of the building insured, but

the agent who issued the policy knew that the building was then occupied. The occupant afterwards moved out, and the building remained unoccupied seven months, when it was destroyed by a fire the origin of which was unknown. The insured knew that the premises were vacant, but gave no notice of the fact to the company, and did not pay or offer to pay an additional premium. *Held*, that the policy had become void. *Wustum v. City Fire Ins. Co.* 15 Wis. 138. 1862.

§ 58. Where a policy of insurance provided, that should the premises insured be applied during the term of the insurance to any of certain prohibited uses, the policy then and from thenceforth, so long as the same should be so appropriated, applied or used, should cease, and be of no force or effect. *Held*, that the application of the property to a prohibited use, within the term, would not affect the right of the assured to recover in case of a loss, if, at the time of the loss, the property was not being so improperly applied or used, and it did not appear that such antecedent misapplication increased the risk or contributed to the loss. *New England Fire & Marine Ins. Co. v. Wetmore.* 32 Ill. 221. 1863.

§ 59. A policy of insurance, issued upon a dwelling-house occupied by tenants, and containing a provision that "the policy becomes void when the occupant personally vacates the premises, unless immediate notice be given to this company and additional premium paid," will become void if the building is vacated, and the only notice given thereof is to an agent of the company whose authority is limited "to take applications and countersign policies, to collect and receive cash for premiums, and to issue a 'binder' on special hazards for ten days," and no additional premium is paid; and it is immaterial that the insured did not know the extent of the agent's authority. *Harrison v. City Fire Ins. Co.* 9 Allen, Mass. 231. 1864.

§ 60. Where a policy of insurance upon a trip-hammer

shop, with the machinery therein, contained a provision that the policy should be void if the building remained unoccupied over thirty days without notice; *Held*, proper to instruct the jury that it is not sufficient to constitute occupancy that the tools remained in the shop, and that the plaintiff's son went through the shop almost every day to look around and see if things were right, but some practical use must have been made of the building; and if it thus remained without any practical use for the space of thirty days, it was, within the meaning of the policy, an unoccupied building for that time, and the policy became void. *Keith v. Quincy Mut. Fire Ins. Co.* 10 Allen, Mass. 228. 1865.

§ 61. A statement in a policy as to the manner in which the building insured is occupied, is not a warranty that it shall continue to be so used during the policy. It is a warranty only as to the present use. To make a continuing warranty it must be so expressed by apt words. *Smith v. Mechanics' & Traders' Fire Ins. Co.* 29 How. N. Y. 384. 1865.

§ 62. Where on account of the character of the use of the property insured special rates are required to be paid and the policy contains no warranty of continued use, a change of such use, keeping within the same character of risk, will not avoid the policy where the risk is not thereby increased. *Smith v. Mechanics' & Traders' Fire Ins. Co.* 32 N. Y. 399. 1865.

§ 63. Where a policy of insurance describes the property insured as being a "two story frame building used for winding and coloring yarn and for the storage of spun yarn," it does not thereby warrant that such building is to continue to be thus used. Such statement is only a warranty as to the present use, and an insurer wishing to protect himself by a continuing warranty as to the future use of a building must do so by language plainly importing such intent. *Smith v. Mechanics' & Traders' Fire Ins. Co.* 32 N. Y. 399. 1865.

§ 64. Where an insurance is made upon goods in a specified building, generally, so as to cover goods in any part of it, the insured cannot escape the consequences of allowing a hazardous business to be carried on in any part of the building by tenants by showing that he only occupied a part of the building, and not the whole, as described in the policy. *Appleby v. Firemen's Fund Ins. Co.* 45 Barb. N. Y. 454. 1866.

See Concealment, § 20. Description of Property Insured, 12. Increase of Risk, 13, 25, 28, 30, 31. Parol Evidence, 27, 33. Pleading and Practice, 18, 52. Preliminary Proofs, 48. Questions for Court and Jury, 6. Risk, 26. Storing or Keeping, 2, 4, 8, 11, 18, 19. Warranty and Representation, 22. Written Portion of Policy, 1, 3.

VALUE.

§ 1. Plaintiff applied for insurance on a factory, representing that an insurance of \$15,000 had already been taken on the property, which was valued at \$19,000. The company declined on the ground that there was insurance enough on the property. The plaintiff then represented that additions had been made to the factory fully equal to \$10,000, and upon the faith of this statement, a policy was issued. This last statement turning out wholly untrue; *Held*, that the policy was void, and that it made no difference that the misrepresentation was made by an agent, and by mistake. *Carpenter v. American Ins. Co.* 1 Story, C. C. U. S. 57. 1839.

§ 2. An over-estimate of \$4,000 in the value of the property, is a gross over-valuation, that avoids the policy; though a slight over-estimate, such as might reasonably be accounted for from difference of opinion, would not have done so. *Catron v. Tennessee Ins. Co.* 6 Humph. Tenn. 176. 1845.

§ 3. The valuation is material to the risk; and misrepresentation, as to value, avoids the policy. *Wilbur v. Bowditch Mut. Ins. Co.* 10 Cush. Mass. 446. 1852.

§ 4. If an applicant for insurance, in reply to inquiry in application, which is made part of the policy, fraudulently over-value the property insured, the policy issued upon such application may be avoided by the company on that ground. *Hersey v. Merrimack County Mut. Ins. Co.* 7 Fost. N. H. 149. 1853.

§ 5. Policy on goods, running from \$2,000 to \$3,000, and so represented by assured. Policy stipulated that the "survey is made part of the policy and warranty on the part of the assured." The application stipulated that the answers therein given were a just, full and true statement of all facts "so far as material to the risk." *Held*, that taking the clauses together, the warranty was not of the literal truth of the facts, but only so far "as material to the risk;" so that if assured had not the amount of goods, but intended his stock to be about those figures, and as the policy was plainly an open one, and the underwriter was to pay only three-fourths the actual loss, the variation was immaterial, and the policy was valid. *Lee v. Howard Fire Ins. Co.* 11 Cush. Mass. 324. 1853.

§ 6. A condition in a policy of insurance "that a false description by the assured of a building insured, or of its contents, or in a valued policy, an over-valuation shall render void a policy issuing upon such description or valuation," does not apply to an over-valuation of goods insured under an open policy. *Lee v. Howard Fire Ins. Co.* 11 Cush. Mass. 324. 1853.

§ 7. A serious over-valuation, knowingly made, upon work not done or a subject not in existence, and that fact not disclosed, is a sufficient cause for avoiding the policy; but a small over-valuation, such as might reasonably be accounted for in difference of opinion, is not. *Protection Ins. Co. v. Hall*, 15 B. Monroe, Ky. 411. 1854.

§ 8. The assured effected an insurance with the defendants on certain buildings for \$1,100, stating their value to be \$3,000. In an action on this policy, it appeared, that a few days before, he had insured the same houses, together with a driving shed, worth \$400, in another office for \$900, and had then valued the whole at from \$1,200 to \$1,400. The evidence as to the actual value was contradictory, and the great difference in the assured's two valuations was not explained. The jury having found for the plaintiff; *Held*, that the evidence supported a plea of fraudulent over-valuation, and a new trial was granted, with costs to abide the event. *Note*—This case has since been again tried, and a second verdict having been rendered for the assured, on evidence not differing materially from that given at the first trial, the court refused to disturb it. *Dickson v. Equitable Fire Assurance Co.* 18 Upper Canada, Q. B. 246. 1859.

See Application, § 17. Evidence, 13, 35, 52. Other Insurance, 13. Title, 18. Two-thirds or Three-fourths Clause, 11. Warranty and Representation, 20. What Property is Covered by the Policy, 25.

VALUED POLICY.

§ 1. Where there is an absolute loss of an article distinctly valued in the policy, the loss is to be estimated according to the valuation; as when policy read, "380 kegs tobacco worth \$9,600," and 157 kegs were lost; *Held*, that the assured was entitled to receive the proportionate value of \$9,600, and not merely the cost of manufacture, with a per-centage added. *Harris v. Eagle Ins. Co.* 5 Johns. N. Y. 368. 1810.

§ 2. A policy of insurance against fire, where the contract states that the company have insured eight thousand five hundred dollars on one brick house, and two wooden ones, is not a valued policy. The words, "valued at," are

invariably used where the intention of the parties is to make the estimate conclusive. *Wallace v. Insurance Co.* 2 La. 559. 1831.

§ 3. Where a policy of insurance against fire covers fifteen thousand dollars of the property insured, and a second policy is taken out of another office, on the same property, as a valued one, which is endorsed on the first policy; it cannot have the effect of putting the first office *duriori casu*, or to convert its policy from an open, to a valued one. *Millaudon v. Western Marine Fire Ins. Co.* 9 La. 27. 1835.

§ 4. A policy insuring \$1,700 on a mill and fixed machinery, and \$150 on movable machinery therein, proceeded in written words as follows: "Said insured being the lessee of said mill for one year from November 1st, 1850, and having paid the rent therefor of \$2,171, which interest diminishing day by day in proportion to the whole rent for the year is hereby insured." *Held*, that the policy was a valued one, although, in a printed part of the instrument, there was a provision, that the loss or damage should be estimated according to the true and actual cash value at the time such loss or damage should happen. *Cushman v. North Western Ins. Co.* 34 Me. 487. 1852.

§ 5. In the application of the assured the value of the property was stated, and in the policies issued were these words: "The amount insured being not more than three-fourths the value of said property, as appears by the proposal of the said assured." *Held*, that these were valued policies in the sense in which that term is applied to policies of fire insurance. *Nichols v. Fayette Mut. Fire Ins. Co.* 1 Allen, Mass. 63. 1861.

§ 6. A valued policy of insurance is not one which estimates merely the value of the property insured, but which values the loss, and is equivalent to an assessment of damages in the event of a loss. *Lycoming Ins. Co. v. Mitchell*, 48 Penn. St. 367. 1864.

See Damages, § 5. Evidence, 29. Two-thirds or Three-fourths Clause, 1, 2, 3, 7.

VENUE.

§ 1. By the Revised Statutes of Massachusetts, C. 90, § 14, 16, a foreigner or inhabitant of another State, may bring suit in any county of the State against an insurance company of Massachusetts, although the company's place of business is in the city of Boston, in the county of Suffolk, and all its annual meetings are held there. *Allen v. Pacific Ins. Co.* 21 Pick. Mass. 257. 1838.

§ 2. Conditions of mutual company in one State authorized suit to be brought in a certain county in another State, and suit to be brought within ninety days from the time the directors, after notice of loss, should determine its amount. *Held*, that courts of Maine were not precluded from the jurisdiction of actions brought to recover losses, in cases where no such determination of the amount of the loss had been made by the directors. *Williams v. New England Mut. Fire Ins. Co.* 29 Me. 465. 1849.

§ 3. Policy provided that upon happening of a loss the directors should proceed to ascertain and determine the same, and if assured were not satisfied with such determination, he should bring an action against the company at the next term of court to be held "in and for Portage County," and the director failed to make any determination and ascertainment of the loss, and assured brought his action in another county than that mentioned in the policy. The act of 1845, in Ohio, provided that suits on policies of insurance might be brought in the county where the contract was made, &c, but also contained the provision "that the provisions of this act shall not be construed to extend to contracts of insurance or agreements for such contracts, made or entered into by any insurance company of this State, whose charter prescribes the venue where alone suits against such company may be

brought." *Held*, that the failure of the directors to ascertain and determine the loss made no difference, as the intention of the legislature was, that when any member of the association, who had suffered a loss, felt himself aggrieved by the action of the company, he should bring his suit in Portage County. *Portage County Mut. Ins. Co. v. Stukey*, 18 Ohio, 455. 1849.

§ 4. Where the act of incorporation of the company provided that suit should be brought within thirty days after the directors had examined and ascertained the loss in a certain county; *Held*, not to apply where the directors had failed to make any examination or determination as to amount of the loss, and that assured might bring his suit in any other county or court. *Boynton v. Middlesex Fire Ins. Co.* 4 Met. Mass. 212. 1842. *Nevins v. Rockingham Mut. Ins. Co.* 5 Fost. N. H. 22. 1852.

§ 5. Where act incorporating company provided that suit should be brought at next term of Jefferson Circuit Court, after directors had ascertained and determined amount of the loss; *Held*, that the condition was binding, in absence of other legislation on the subject; but where code of practice adopted afterwards provided means of redress against insurance companies and other corporations; *Held*, that a suit, instituted in another county by service on agent of company therein, and in conformity with provisions of code of practice, was properly within its jurisdiction. *Howard v. Kentucky & Louisville Mut. Ins. Co.* 13 B. Monroe, Ky. 282. 1852.

§ 6. Where condition provided that, after notice of loss, the directors would examine and ascertain the extent of same, and, if assured were dissatisfied, he should bring suit at next term of court in Marion county; and the directors were notified of the loss, but failed to ascertain and determine the same; *Held*, that assured's remedy was under the general law, and service on an agent in any other county, and suit therein, was legal and proper. *Indiana Mut. Fire Ins. Co. v. Routledge*, 7 Ind. 25. 1855.

§ 7. A stipulation in one of the conditions of a stock policy, that, in case of loss, no action shall be brought upon it, except in the county of Worcester, is no legal bar to an action in another county, where by law the action might be brought if no such condition had been made. *Hall v. People's Mut. Fire Ins. Co.* 6 Gray, Mass. 185. 1856.

§ 8. The act of incorporation and by-laws of an insurance company in the State of New Hampshire provided that upon notice of loss, "the directors shall proceed as soon as may be to ascertain and determine the amount thereof, and shall pay the same within three months after such notice; but if assured shall not acquiesce in their determination, his claim may be submitted to referees, or he may within three months after such determination, but not after that time, bring an action at law against said company for such loss; which action shall be brought at a proper court in the county of Merrimack," State of New Hampshire. A. having insured in said company, notified them of a loss, but the directors neglected to "ascertain and determine the amount thereof; *Held*, that the directors having neglected or refused to do their duty, A. might maintain an action against the company for the loss, after the time limited in the by-laws; that after a contract has been broken, the remedy is regulated by law and must be governed by the law of the forum where redress is sought, and that A. was not bound by the provisions that any suit should be brought in the county where the company is established. *Bartlett v. Union Mut. Fire Ins. Co.*, 46 Me. 500. 1859.

§ 9. A provision in the charter of an insurance company which limits a suit on the policy to the county where the company is located, pertains merely to the remedy, and may be changed by a general law upon the subject. *Sanders v. Hillsborough Ins. Co.* 44 N. H. 238. 1862.

§ 10. A clause in an act incorporating a mutual fire

insurance company, providing that, "in case of loss by fire," the insured shall give notice thereof in writing to the directors within thirty days; and the directors shall ascertain and determine the amount of such loss, and if the party suffering is not satisfied with such determination, he may bring an action against said company for said loss, at the next court, to be holden in and for the county" where said company is established, "and not afterwards," neither repeals in express terms nor by necessary implication the general law of the State authorizing the plaintiff to maintain his action in the county where he resides. *Martin v. Penobscot Mut. Fire. Ins. Co.* 53 Me. 419. 1866.

See By-Laws and Conditions, § 9, 10. Limitation Clause, 10. Premium Notes, 11, 18.

WAIVER.

§ 1. The fact that the underwriter failed to specify the non-production of the preliminary proofs, required by the policy, as an objection to the payment of the loss, is not sufficient evidence to justify the jury in inferring that the underwriter had thereby waived the production of such proofs. *Columbian Ins. Co. v. Lawrence*, 2 Pet. U. S. 25. 1829.

§ 2. A defect in the certificate presented to the company is not waived by their receiving it without objection, nor by adopting a resolution that the company will not pay the claim made by the plaintiff, or any part thereof, believing that it is founded in an attempt to defraud the company. *Roumage v. Mechanics' Fire Ins. Co.* 1 Green, N. J. 110. 1832.

§ 3. Where, after the loss of insured property, repeated communications had taken place with the officers and agents of the company, and in some instances, in pursuance of directions from the board of directors, after the preliminary proofs were delivered, and no objection was made to the sufficiency of such proofs, but the refusal of the company to pay, based upon an entirely different ground; *Held*, that the defects in such proofs must be considered as waived. *McMasters v. Westchester County Mut. Ins. Co.* 25 Wend. N. Y. 379. 1841.

§ 4. Where assured under advice and direction of an agent of the company, made out the preliminary proofs, in compliance with the requirements of the policy, as he supposed, and subsequently, at the request of the insurers, produced his books of account, which were examined by the insurers, who then offered to pay a certain portion of the insurance money, which assured refused to accept, and brought suit in equity on the policy; *Held*, that the company having failed to point out the particular defects in the preliminary proofs, and having expressed no dissatisfaction therewith, except in general terms as to the loss generally, could not upon the trial make such an objection. *Bodle v. Chenango County Mut. Ins. Co.* 2 Comst. N. Y. 53. 1848.

§ 5. The payment by the insurers, to the insured, of a part of the sum agreed to be paid by the policy, is a waiver of the usual preliminary proofs. *Westlake v. St. Lawrence County Mut. Ins. Co.* 14 Barb. N. Y. 206. 1852.

§ 6. If a deficiency in the plaintiff's proof is supplied during the trial by the defendants themselves, it is a waiver of any exception they may have taken, based on such deficiency; and if the insured is examined as a witness by the defendants, this is a waiver of an exception taken to a decision, excluding his admissions. *Westlake v. St. Lawrence County Mut. Ins. Co.* 14 Barb. N. Y. 206. 1852.

§ 7. Where there are defects in the preliminary proofs, given to the underwriter, in compliance with a condition of the policy, and those defects are supplied by additional proofs furnished by the assured in compliance with the request of the company, and received and returned by them without objection, and afterwards they refuse to pay the loss, because they concluded that they were not legally liable; *Held*, that the company had waived their rights to insist upon the defects or omissions in such preliminary proofs. *Bumstead v. Dividend Mut. Ins. Co.* 2 Kern. N. Y. 81. 1854.

§ 8. Where insurers plead non-payment of premium as a bar to recovery on a policy, and in the supplemental answer, allege misrepresentation and concealment, the plea of non-payment is waived. *Michael v. Mutual Ins. Co. of Nashville*, 10 La. An. 737. 1855.

§ 9. An insurance company, by consenting to make a policy upon an application in which one or more questions are unanswered, waive all claim for further answers. *Hall v. People's Mut. Fire Ins. Co.* 6 Gray, Mass. 185. 1856.

§ 10. Insurance company waives the right to object to preliminary proofs, if they omit to point out defects in time, or refuse to pay upon other grounds. *Firemen's Ins. Co. v. Crandall*, 33 Ala. 9. 1858. *Francis v. Somerville Mut. Ins. Co.* 1 Dutch. N. J. 78. 1856.

§ 11. If insurer places his refusal to pay for a loss on other grounds than defects in the preliminary proofs, he cannot object to such insufficiencies on the trial. *Underhill v. Agawam Mut. Ins. Co.* 6 Cush. Mass. 440. 1850. *Peoria Marine & Fire Ins. Co. v. Lewis*, 18 Ill. 553. 1857.

§ 12. A valid legal objection to the payment of a loss on a policy of insurance, is not a waiver of all other objections, if the plaintiff go into equity to avoid the effect

of that objection at law. *Brown v. Savannah Mut. Ins. Co.* 24 Ga. 97. 1858.

§ 13. A policy issued to a mortgagee of the insured property, required certain proofs to be made by assured in case of a loss. After the loss, the mortgagor made out the proofs required, stating that the buildings were insured by the defendants, and specified their numbers and the streets on which they were situated, and also gave the number of the policy under which they were insured. Accompanying these proofs made by the mortgagor, was an affidavit of the insured mortgagee, verifying the above facts. The company made no objection to these proofs at the time, or afterwards, until the trial of the action, that they were not made by the "insured," or for any other cause. *Held*, that they had thereby waived any objections as to them. *Kernochan v. New York Bowery Fire Ins. Co.* 17 N. Y. 428. 1858.

§ 14. The rule that insurers will be held to have waived objections to defects in the preliminary proofs presented by a claimant if they do not distinctly specify their intention to rely upon such objections, and especially if instead of so doing they assert a distinct ground of defense, or only generally deny their liability, rests upon the tendency of such a course to mislead the claimant; and insurers who apprise a claimant that his papers are not proof, and refer him to the policy, will not be held to have waived defects in such proofs because they did not go further and specify them; nor because they at the same time took other objections to being held liable. *Kimball v. Hamilton Fire Ins. Co.* 8 Bosw. N. Y. 495. 1861.

§ 15. A policy provided for the payment of losses within sixty days after the same should be ascertained and proved. A loss was proved and demand of payment made within the time limited. The loss was admitted by the insurance company which offered payment of what it assumed to be the amount of its liability, but payment of the full amount of the insurance was refused. *Held*, that

the condition as to the time of payment was waived, and that the sum for which the insurers were bound became due and recoverable with interest from the date of the demand. *Baltimore Fire Ins. Co. v. Loney*, 20 Md. 20. 1862.

§ 16. The requirements of a policy that a particular statement of loss shall be furnished, may be waived. *Franklin Fire Ins. Co. v. Updegraff*, 43 Penn. St. 350. 1862.

§ 17. A notice by an insurer, under a condition of the policy authorizing him at his election to rebuild or repair in case of loss, that he elects to rebuild or repair, is a waiver of any defence based upon misrepresentations by the assured at the time of the application; if the fact of such misrepresentations be known to the insurer when he gives the notice. *Bersche v. Globe Mut. Ins. Co.* 31 Mo. 546. 1862.

§ 18. A clause in a policy of insurance providing that the interest of the assured in the policy, or in the property insured, is not assignable without the consent of the insurers, in writing; and that in case of any transfer or termination of such interest without such consent the policy shall thenceforth be void and of no effect, is to be regarded as a provision made for the exclusive benefit of the company, and to be practically exercised by them or not, at their option. If, after the assured has transferred his interest in the policy and in the property insured without the written consent of the company, the company choose to ratify the transfer, and, notwithstanding the transfer, to continue the insurance, the policy will not be absolutely void. If, after notice of such transfer, they treat the assignee as a member of the company, they will be estopped from denying such ratification and approval. *Hyatt v. Wait*, 37 Barb. N. Y. 29. 1862.

§ 19. The insurer may waive the benefits of a condition that any misrepresentation or concealment on the part of the insured shall avoid the policy. *Bersche v. Globe Mut. Ins. Co.* 31 Mo. 546. 1862.

§ 20. Where the policy provided that the insurance should be void if articles denominated "hazardous" should be stored in the building without the consent of the company indorsed on the policy, and the agent of the company consented to the removal of the property to another building in which such hazardous articles were stored, and agreed to make whatever entry was necessary on the policy to continue it in force notwithstanding such storage, and took and retained the policy for the purpose. *Held*, that the agreement of the agent was a waiver by the company of the condition which required such written indorsement of consent until such indorsement should be made. *Rathbone v. City Fire Ins. Co.* 31 Conn. 194. 1862.

§ 21. If by the terms of a contract of insurance it is expressly provided that the application on which the policy is issued shall be held to be a warranty on the part of the assured, knowledge by the agent or officers of the company that certain answers in the application were not correct is no evidence of a waiver by the company, and the policy is void. *Tebbetts v. Hamilton Mut. Ins. Co.* 3 Allen, Mass. 569. 1862.

§ 22. The assessment and collection of a premium note by a mutual insurance company, after it has been advised of violations of the conditions of the policy, operates as a waiver of any forfeiture occasioned by such violations. *Keenan v. Dubuque Mut. Fire Ins. Co.* 13 Iowa, 375. 1862.

§ 23. Where the general agent of an insurance company, acting in the matter of his agency and in relation to the particular loss and controversy in question, stated to an agent of the plaintiff who had prepared and forwarded the preliminary proofs, that it was only the quantity and value of the property that the company disputed; *Held*, a waiver by the company of all objection to the preliminary proofs on account of defects in them. *Rathbone v. City Fire Ins. Co.* 31 Conn. 194. 1862.

§ 24. A waiver of formal preliminary proof of loss may be proved by evidence that one of the officers of the company made personal examination of the premises after the fire in company with a person interested in the property; that afterwards, and within the time limited for making formal proof of loss, the secretary told the person to whom the amount insured was payable that no further proof of loss was necessary; that the directors, upon the informal proof, and within the time limited for making formal proof, passed a vote appointing a committee to adjust the loss; and that afterwards, in refusing to pay the loss, the refusal was put solely on other grounds. *Priest v. Citizens' Mut. Fire Ins. Co.* 3 Allen, Mass. 602. 1862.

§ 25. The general agent of a company sent a policy by mail to an applicant for insurance with a statement that the premium charged was higher than usual, and saying "Should you decline the policy, please return; if you retain it, please send me the premium." *Held*, a waiver of a condition in the policy requiring prepayment of the premium. *Sheldon v. Atlantic Fire & Marine Ins. Co.* 26 N. Y. 117. 1863.

§ 26. An offer of compromise of a claim on a policy for a loss, made by the insurer, after the preliminary proofs of loss had been received and examined without making any objections to the proofs, is a waiver of any defects in such proofs. *Van Deusen v. Charter Oak Fire & Marine Ins. Co.* 1 Robert. N. Y. 55. 1863.

§ 27. Where insurers received and examined the proofs of loss presented by the insured, and, in answer to subsequent inquiries on his part, whether there were any further proofs that he could show, or any thing further was wanted of him, answered that there was not, and afterward offered to compromise the claim, but without making any objection to the proofs. *Held*, that the insurer must be deemed to have waived the objection, that a magistrate's certificate, which the policy required should accompany

the proofs of loss, was never served on them. *Van Deusen v. Charter Oak Fire & Marine Ins. Co.* 1 Abb. Pr. N. S. N. Y. 349. 1863.

§ 28. The provisions of the statute of Maine requiring certain notice and proof of loss to be furnished the company may be waived by the company or its officers. *Lewis v. Monmouth Mut. Fire Ins. Co.* 52 Me. 492. 1864.

§ 29. While mere silence will not amount to a waiver of defects in proofs of loss, an objection to the proofs upon one specific ground and silence as to another in which was the real defect, operates as a waiver of such defect. *Ayres v. Hartford Fire Ins. Co.* 17 Iowa, 176. 1864.

§ 30. The act of receiving an additional premium for a variation of the risk after the existence of facts which would authorize a forfeiture, had become known to the insurers, must, in the absence of fraud and concealment, be regarded as a waiver of the forfeiture. *North Berwick Co. v. N. England F. & M. Ins. Co.* 52 Me. 336. 1864.

§ 31. Notice of a fact material to the risk to the agent of a company is notice to the principal, and by taking the premium and issuing the policy the company must be regarded as waiving objection on account thereof. *Peoria Marine & Fire Ins. Co. v. Hall*, 12 Mich. 202. 1864.

§ 32. If an insurer receives and retains preliminary proofs of loss without objection, he will be deemed to have waived any defects or insufficiencies therein. *Brown v. King's County Fire Ins. Co.* 31 How. N. Y. 508. 1865.

See Agent, § 3. Alienation, 66. Application, 27, 42. Assignment, 38. Certificate, 8, 9, 11, 13, 17. Consummation of Contract, 17. Dependency of Policy and Premium Note, 10, 12, 16, 18. Endorsements, 3, 6. Limitation Clause, 2, 3, 4, 8, 12, 15, 21. Notice of Loss, 6, 7, 9, 14, 17, 18, 20, 22, 27, 32, 33. Other Insurance, 32, 62, 78, 88. Payment of Premium, 4, 6, 8, 9, 12, 17. Parol Evidence, 27. Pleading and Practice, 21, 79. Preliminary Proofs, 8, 12, 13, 15, 17, 18, 22, 24, 26, 27, 29, 30, 31, 32, 33, 34, 36, 38, 41, 47. Questions for Court and Jury, 16. Rebuild, Replace, or Repair, 5. Revival and Suspension of Policy, 2, 3, 5, 6, 7. Title, 41. Use and Occupation, 56.

WARRANTY AND REPRESENTATION.

§ 1. A policy of insurance on a manufacturing establishment provided that, "if the situation or circumstances affecting the risk upon the property insured shall be altered or changed, by or with the advice, agency or consent of the assured or their agent, so as to increase the risk thereupon, without the consent of the company, the policy shall be void." *Held*, that this clause, taken in connection with certain representations in the application of assured, as to certain usages and practices observed at the factory, as to mode of conducting their business, and as to precautions taken to guard against fire, was, in legal effect, a stipulation, not only that the facts were true at the time, but that as far as the assured, and all those entrusted by them with the care and management of the property, were concerned, such modes of conducting the business should be substantially observed, and such precautions substantially be continued to be taken, during the continuance of the policy; and that if any alteration or change should be made, or any custom or practice, different from that represented, should be introduced, whereby the risk should be increased, the policy should be void. *Houghton v. Manufacturers' Mut. Fire Ins. Co.* 8 Met. Mass. 114. 1844.

§ 2. Representations of the insured are not to be taken as warranties, so that the slightest variation would release insurers, but as statements of facts, which do not release insurers, unless materially different from truth, and that in a way which increases the risk; its materiality being determined by the amount of premium required. But the representations, if material, will avoid the policy, whatever may be the cause of the loss. *Nicol v. American Ins. Co.* 3 Woodb. & Minot, C. C. U. S. 529. 1847.

§ 3. The assured represented that there were no lamps in the picking room. The proof was that lamps were used in the picking room, which materially increased the risk, and from which the fire arose. *Held*, that the policy was void. *Clark v. Manufacturers' Ins. Co.* 2 Woodb. & Min. C. C. U. S. 472. 1847. Affirmed, 8 How. U. S. 235. 1850.

§ 4. Warranties cannot be deviated from in the smallest particular, whether material or immaterial; but the insured is not answerable on account of representations, unless they differ, in material respects, from the truth, or are departed from in a material manner. When the representations are *dehors* the policy, and are not referred to in it as warranties, they are not to be treated as warranties. *Nicol v. American Ins. Co.* 3 Woodb. & Min. C. C. U. S. 529. 1847.

§ 5. The application for insurance was referred to in the policy as forming a part thereof. In such application in answer to a question as to the stoves, assured answered: "Pipe passes through the window at side of the building. There will, however, be a stove chimney built, and the pipe will pass into it at the side." Three years afterwards the building was destroyed by fire, the chimney not yet having been built. *Held*, that the policy was void. It further appearing that the secretary had endorsed upon the policy the following: "Consent is given that the within policy remain good notwithstanding the stove in said mill has been removed." &c.; *Held*, that such endorsement did not exonerate the assured from building the chimney according to his promise. *Murdock v. Chenango County Mut. Ins. Co.* 2 Comst. N. Y. 210. 1849.

§ 6. The assured in giving notice to the company of the introduction, into the mill insured, of a kiln drying machine, stated, "it is for burning hard coal." *Held*, that this was a mere statement that the machine was designed "for burning hard coal," without binding the assured not

to use other fuel, if it should become necessary; provided the risk was not thereby increased. *Tillou v. Kingston Mut. Ins. Co.* 7 Barb. N. Y. 570. 1850.

§ 7. In a verbal application for leave to obtain an additional insurance, the statements made to first company insuring are not warranties; they are only representations which may be untrue, and yet, if not fraudulently made, if they are immaterial, and produce to the defendant no injury, will not avoid the policy issued by the defendants. *Williams v. New England Mut. Fire Ins. Co.* 31 Me. 219. 1850.

§ 8. In the application in this case was this question: "In what are ashes kept at all times?" Answer: "Brick." *Held*, that if after the issuing of the policy upon the application, the ashes of assured were kept as safely in the building insured, as if they had been kept in the mode represented in the application, the assured, so far as this point was concerned, would be entitled to recover. *Underhill v. Agawam Mut. Ins. Co.* 6 Cush. Mass. 440. 1850.

§ 9. A representation, inserted in a policy, becomes a warranty. Representations are part of the proceedings preliminary to the contract. *Williams v. New England Mut. Ins. Co.* 31 Me. 219. 1850.

§ 10. The rule, that warranty does not extend to defects, which are known to the purchaser in sales of property, does not apply to warranties in contracts of insurance. *Kennedy v. Insurance Co.* 10 Barb. N. Y. 285. 1851.

§ 11. A representation precedes, and is no part of the contract of insurance, and need be only materially true; but a warranty is part of the contract, and must be exactly and literally fulfilled, or else the contract is broken and policy becomes void. *Glendale Woolen Co. v. Protection Ins. Co.* 21 Conn. 19. 1851.

§ 12. Any misrepresentation in regard to encumbrances or title, in a mutual insurance company, in reply to inquiries, avoids the policy, although not made with a knowledge of their falsity on the part of assured, or with any intent to deceive. *Wilbur v. Bowditch Mut. Ins. Co.* 10 Cush. Mass. 446. 1852.

§ 13. No mere representation, made by the assured, is a warranty. A representation which is false, will avoid the policy, if the actual risk were greater than it would be if the representation were true; otherwise not. *Wall v. Howard Ins. Co.* 14 Barb. N. Y. 383. 1852.

§ 14. Agent of plaintiffs handed a brief memorandum to insurers, reading: "Wall, Richardson & Engle wish insurance on their own, &c., their stock as rope manufacturers, contained in the brick building with tin roof, iron shutters, first story occupied as a store house on the northerly side and about 42 feet distant from ropewalk;" upon which insurers made out a policy and referred to above application, but did not in express words make it part of the policy. *Held*, that it was not part of the contract, but a representation; and only material as a defense to the insurers, in showing that they were misled in a material matter, and made an insurance at a rate which they would not have done, if they had not been misled. *Wall v. Howard Ins. Co.* 14 Barb. N. Y. 383. 1852.

§ 15. Under clause, "that whenever the circumstances disclosed in any application shall become so changed as to increase the risk, the policy shall become void, unless," &c.; *Held*, that a statement in the application which was expressly made part of the policy, that the counting room was warmed with coal by one stove, and that the funnel and stove were well secured, must be understood to mean, that when it was warmed at all, it was thus warmed; and not the stove and funnel were well secured during the summer season, when there was no occasion to warm the room. Although, therefore, they were not thus secured

when the loss happened, yet it was not such a change of circumstances within the meaning of the condition, as to avoid the policy. *Loud v. Citizens' Mut. Ins. Co.* 2 Gray, Mass. 221. 1854.

§ 16. The conditions of insurance annexed to a policy and made part of it, required applications for insurance to be in writing ; and to specify divers particulars, all relating to a description of the premises and the uses to which it was applied ; and providing that a false description by the assured should avoid the policy ; and that when the policy issued upon a survey and description, it should be deemed a part of the policy and warranty on the part of the assured. *Held*, that other facts stated in the application, not required to be stated therein by the conditions of the policy, or descriptive of the premises, were not made part of the contract, and were to be treated as representations, and not warranties ; although the survey was referred to in the policy in these words : " For a more particular description of said premises, see survey No. 74, furnished by the insured, which is hereby made a part of this policy." But though such statements are to be treated as representations, yet they are representations made material by the parties, and therefore that materiality was not a question for the jury. When, therefore, in reply to a question of " ashes, how disposed of ? " the reply was, " thrown out ; " and evidence went to show, that before the taking out of the policy, some of the ashes had been placed in a wooden box in kitchen by family of defendant's clerk, for the purpose of softening water to wash with, and what were not wanted for this purpose were thrown out, and that the uniform practice had been to wet down those put in box, but it had been forgotten one night, and the box had been set fire from them, but not the house ; the judge instructed the jury, that if the representations as to ashes were substantially untrue ; if the habit was to deposit the ashes in the building insured, the policy was void, whether the representation was made intentionally or by a mistake ; and whether the applicant knew what was done with the

ashes or not ; but if the ashes were generally and usually thrown out, and only deposited in the building occasionally, or for special or extraordinary purposes, or accidentally, it would not avoid the policy. *Protection Ins. Co. v. Harmer*, 2 Ohio St. (22 Ohio) 452. 1853.

§ 17. A misrepresentation of a fact, which was in no way material to the risk, and could have had no effect to increase the premium, if known, will not make the policy void ; no matter whether it be contained in the policy, or be outside of it. *Roth v. City Ins. Co.* 6 McLean, C. C. U. S. 324. 1855.

§ 18. A policy of insurance upon a building, in course of construction, contained this statement in the application: "Water tanks to be well supplied with water at all times;" *Held*, that this statement must be taken to be made with reference to the existing state of the building, and required a performance of the conditions or stipulations adapted to that state of things ; the water tanks were to be supplied with all reasonable diligence, having reference to the progress in the construction of the building insured ; and they were not required to have them at all times well supplied, from the first moment the policy issued, as they would have been had the policy been on a finished building. *Gloucester Manufacturing Co. v. Howard Fire Ins. Co.* 5 Gray, Mass. 497. 1855.

§ 19. Warranty is a stipulation, on the literal truth and fulfillment of which, the entire contract depends. The insurer has a right to exact a literal compliance, and cannot be compelled to accept a substantial compliance. *Sayles v. North Western Ins. Co.* 2 Curtis, C. C. U. S. 612. 1856.

§ 20. Where a by-law declared that, unless the applicant for insurance should make a true representation of the property on which he requests insurance, "so far as concerns the risk and value thereof, the policy, issued

thereon, shall be void ;" *Held*, that only those representations which concern the risk and value of the property, affect the contract, and that this being so, the questions arising upon all omissions to make true representations of the property, become questions of fact, whether the risk was increased or the value over-stated. *Chase v. Hamilton Mut. Ins. Co.* 22 Barb. N. Y. 527. 1856.

§ 21. Warranty of force pumps ready for use, includes warranty of power to work the pumps ; but no particular kind of power, nor that the pumps shall not be disabled by the fire. *Sayles v. North Western Ins. Co.* 2 Curtis, C. C. U. S. 612. 1856.

§ 22. An application to another company, containing certain representations, was adopted by the defendants as forming a part of their policy. In such application, in reply to the question, "During what hours is the factory worked?" plaintiff answered, "We run the pickers, cards, drawing frames, and speeder day and night; the rest only twelve hours daily. We only intend running nights until we get more cards, &c., which are making; shall not run nights over four months." *Held*, that the statement of an intention to cease running, when they received the cards then being made, was equivalent to an agreement to cease upon that event; and the subsequent clause, "We shall not run nights over four months," was plainly but a precise definition and limitation of this agreement. When, therefore, after the four months had passed, a fire occurred on the 11th of the month, destroying part of the machinery, and to make up for the lost time, the factory was worked at night until a second fire on the 20th of same month; *Held*, there could be no recovery for the loss occurring at the second fire, after the violation of the agreement. The doctrine of "promissory representation," and case of *Murdock v. Chenango Mut. Ins. Co.* 2 Comst. 210, examined. *Bilbrough v. Metropolitan Ins. Co.* 5 Duer, N. Y. 587. 1856.

§ 23. An inquiry, made by insurer, shows that he

deems the matter inquired about material; an answer by the assured admits the materiality. It is an agreement, that the matter inquired about is material; and, therefore, the materiality of answers to questions of insurer, cannot be submitted to the jury. *Wilson v. Conway Ins. Co.* 4 R. I. 141. 1856.

§ 24. Where from the ambiguity of the language employed by the insurers it cannot be certainly determined whether certain answers and plans in the application were intended as warranties or representations, the court will construe in favor of the assured, by holding so much of the application as is not declared to be warranty, as representation merely. *Wilson v. Conway Ins. Co.* 4 R. I. 141. 1856.

§ 25. A false representation of a material fact is sufficient to avoid a policy of insurance underwritten on the faith thereof, whether the false representation be by mistake or design. And a misrepresentation made by an agent in procuring a policy, is equally fatal, whether made with the knowledge or consent of the principal or not. *Carpenter v. American Ins. Co.* 1 Story, C. C. U. S. 57. 1839.

§ 26. The representation, that there is a force pump in starch manufactory, does not, by implication include hose. *Peoria Marine & Fire Ins. Co. v. Lewis*, 18 Ill. 553. 1857.

§ 27. Plaintiffs applied to the defendants for re-insurance in sum of \$10,000, on sugar and molasses, on certain plantation, saying, "We have buildings." The insurance was effected, and afterwards it was shown that plaintiffs had no insurance on the buildings. *Held*, that the representation, being false, and intended to influence the minds of defendants in taking the risk, was material and therefore fatal to the contract. *Louisiana Mut. Ins. Co. v. New Orleans Ins. Co.* 13 La. An. 246. 1858.

§ 28. The written portion of the policy read as follows: "\$2,400, on the hull and cabins; \$1,200, on the engines and boilers, and \$400, on the tackle and furniture of the steamboat Malakoff, now lying in Tate's dock, Montreal, and intended to navigate the St. Lawrence and lakes from Hamilton to Quebec, principally as a freight boat, and to be laid up for the winter in a place approved by this company." That boat remained in the dock until destroyed by fire, without ever having navigated, or being even in a condition to navigate. *Held*, that the words in the policy as to the intention to navigate constituted a warranty that the boat should run during the summer and be laid up in the winter, but having, in fact, never left the dock at all, the assured could not recover. *Grant v. Aetna Ins. Co.* Queen's Bench, Appeal Side, Montreal, Lower Canada. 1860.

§ 29. Policy provided that, "if, subsequent to the making of the application, any new fact should exist, either by a change of any fact disclosed by the application, the erection or alteration of any building, the carrying on of any hazardous trade," &c., * * * "by the assured or others, which increases the risk, or which it would have been necessary to state, had it existed at the time the application was made, the policy thereon shall be void, unless written notice thereof shall be given the directors, their written consent obtained," &c. The other provisions and covenants, as to answers in application, were substantially the same as in *Tebbetts v. same company*, 1 Allen, 305. (See, *Distance of Other Buildings*, § 20.) Subsequent to the insurance, a building, described in the application, on the south east corner of the main building, as "one story in height, and 20x12 feet, and used for wool washing," was removed and another put up in its place, two stories high, and 20x30 feet, and used for drying wool by means of stoves; without any notice or consent of the company. *Held*, that the non-communication of such change and alterations avoided the policy, whether in the opinion of the jury it increased the risk or not.

Calvert v. Hamilton Mut. Ins. Co. 1 Allen, Mass. 308. 1861.

§ 30. An application by a town for an insurance on a school-house stated, in answer to an interrogatory that the ashes were taken up in metallic vessels which were not allowed to stand on wood with ashes in them, and that the ashes if deposited in or near the building were in brick or stone vaults; and concluded with a memorandum that "if ashes are allowed to remain in wood, the insurers will not assume the risk." The application was made part of the contract of insurance. There were no vaults of brick or stone, and the ashes were generally deposited on the ground at a distance from the building; but a boy employed by the school committee to take charge of the building for two or three weeks before the fire, without orders, placed the ashes in a wooden barrel in a shed adjoining the school house. *Held*, that the insurers were discharged. City of Worcester v. Worcester Mut. Fire Ins. Co. 9 Gray, Mass. 27. 1857.

§ 31. Where an applicant for insurance represented that no cotton or woolen waste or rags were kept in or near the property to be insured, and that it appeared that at the time of the fire 1500 pounds of paper-rags were in the store; *Held*, that this fact did not avoid the policy, it not being shown that the representation was untrue when made, and neither the policy, charter or by-laws of the company providing that the keeping of such articles should invalidate the insurance. Gould v. York County Mut. Fire Ins. Co. 47 Me. 403. 1859.

§ 32. That a party in his application for insurance, which application is made part of the policy, called the property "his property" does not constitute a warranty on his part that he holds the fee simple thereof unencumbered. Mutual Ins. Co. v. Deale, 18 Md. 26. 1861.

§ 33. Where statements are made with the qualifica-

tion that they "are true so far as known to the applicant and material to the risk," to avoid a policy founded thereon on account of a variance of such statement from the facts, their materiality to the risk must appear; although in terms such statements amount to a warranty. *Ætna Ins. Co. v. Grube*, 6 Minn. 82. 1861.

§ 34. Misrepresentations do not avoid a policy of insurance unless they are material to the risk or prejudicial to the insurers. *Witherell v. Maine Ins. Co.* 49 Me. 200. 1861.

§ 35. Warranties in a policy of insurance, or in the application when made a part of the policy, must be fully kept and performed, without reference to the question whether they are material to the risk or not. *Witherell v. Marine Ins. Co.* 49 Me. 200. 1861.

§ 36. To make a stipulation an express warranty, so that on the literal fulfilment thereof the entire contract shall depend, it should be inserted in writing on the face of the policy, or in a detached paper expressly stipulated to be a part of the policy. *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352. 1862.

§ 37. A mere representation, as distinguished from a warranty, is a verbal or written statement made by the assured to the underwriter before the subscription of the policy, as to the existence of some fact or state of facts, tending to induce the underwriter more readily to assume the risk, by diminishing the estimate he would otherwise form of it. *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352. 1862.

§ 38. A want of truthfulness in a representation, is fatal or not to the insurance, as it happens to be material or immaterial to the risk undertaken. *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352. 1862.

§ 39. Where an applicant for an insurance covenants in his application that it contains "a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant, and are material to the risk;" and the policy declares that the application is made a part of the policy, and that the policy "is made and accepted upon the representation of the assured in his application;" the statements made in the application, if warranties, are such only so far as the facts stated "are known to the applicant, and are material to the risk." *Garcelon v. Hampden Fire Ins. Co.* 50 Me. 580. 1862.

§ 40. A warranty in a policy is a contract as to an existing fact, and not a covenant for future acts, and differs from a representation in that it is a binding agreement that the fact is as warranted; while a representation is not an agreement that the facts stated is so, but only such a statement of it as will constitute a misrepresentation if it be untrue. *Lycoming Ins. Co. v. Mitchell*, 48 Penn. St. 367. 1864.

§ 41. When at the time of applying for insurance, a paper, called in the policy a survey, is filled out by the applicant and delivered to the agent of the insurer, and the policy expressly refers to such survey, and makes it a part of the policy, any representation contained therein is to be deemed a warranty. *Ripley v. Ætna Ins. Co.* 30 N. Y. 136. 1864.

See Application, § 1, 3, 4, 10, 24, 48, 49. Construction, 7. Description of Property Insured, 10, 20, 22. Distance of Other Buildings, 3. Encumbrances, 23, 39. Parol Evidence, 8. Pleading and Practice, 19, 20. Questions for Court and Jury, 2. Title, 14. Use and Occupation, 8, 17, 31. Watchman, 6. And also see, Application, Description of Property Insured, Distance of Other Buildings, Encumbrance, Title, Use and Occupation, and Value.

WATCHMAN.

§ 1. In answer to the fourteenth question in application, "Is a watch constantly kept in the building? If not, state the arrangement respecting it." Answer: "No watch is kept, but the mill is examined thirty minutes after work." *Held*, that this statement was one which as a general practice was bound to be observed, though an occasional omission, owing to accident or negligence of workmen, not sanctioned or permitted by assured, might not be a breach or non-compliance. And where answer was made "that the factory was worked from 5 A. M. until 8½ P. M.—sometimes extra work will be done;" *Held*, that the assured were bound to make such examination thirty minutes after the cessation of extra work as well as after the regular work. *Held*, also, that the question of what is a cessation of work at the factory, thirty minutes after which the examination was to be made, was, under all the circumstances of the case, a question for the jury to determine. *Houghton v. Manufacturers' Mut. Ins. Co.* 8 Met. Mass. 114. 1844.

§ 2. Where there is a warranty that a "suitable watch" will be kept, it is not for the court, but for the jury to decide, what, under the circumstances is a "suitable watch." *Percival v. Maine M. M. Ins. Co.* 33 Me. 242. 1851.

§ 3. The stipulation, "a watchman kept on the premises," inserted in the body of the policy, immediately after the description of the property insured, is in the nature of a warranty, and must be substantially complied with by the assured. But such expression does not require a constant watch, and if a watchman is kept in the manner in which men of ordinary care and skill in similar depart-

ments keep a watchman, it is sufficient. Evidence of the usage of similar establishments in keeping a watchman, is admissible, in an action on such policy. *Crocker v. People's Mut. Fire Ins. Co.* 8 Cush. Mass. 79. 1851.

§ 4. One of the questions in survey which was made part of the policy, was "Is there a watchman in the mill during the night?" the answer being, "There is a watchman nights." The property was burned on Sunday morning, when no watchman was on duty, he having left Saturday night. *Held*, that the survey contained a clear and certain engagement by the insured, that they would keep a watchman in their mill through the hours of every night in the week, from the time of ceasing work in the evening to the usual hour of commencing in the morning, and this engagement having been broken, they could not recover on the policy. *Glendale Manufacturing Co. v. Protection Ins. Co.* 21 Conn. 19. 1851.

§ 5. The policy bound assured to keep a night watch upon the premises at all times during life of policy. *Held*, that because the watchman, unknown to the assured, had agreed, and did occasionally look after a yard opposite the one insured, there was not such a non-compliance with the requirements of watchman as to avoid the policy. *Hovey v. American Mut. Ins. Co.* 2 Duer. N. Y. 554. 1853.

§ 6. The survey was referred to in policy as follows: "Reference is made to survey No. 83 on file in the office of the Protection Insurance Company." One of the questions in the survey thus referred to, was "Is there a watchman in the mill during the night?" Answer: "There is a watchman nights." *Held*, that the answer was not a warranty, but a representation, material to the risk, to be substantially kept and performed, and there being no watchman in the mill on Sunday morning, when it was destroyed, assured could not recover. *Sheldon v. Hartford Fire Ins. Co.* 22 Conn. 235. 1853.

§ 7. The policy was based on a written application, which was made part of the policy. Question eight, in such application was, "Is there a watchman in the mill during the night?" Answer: "There is a watchman nights." Question: "Is the mill left alone at any time after the watchman goes off duty in the morning until he returns to his charge in the evening?" Answer: "Only at meal times, and on the Sabbath, and other days when the mill does not run." The property insured was destroyed by fire between three and four o'clock in the morning of Sunday. No watchman was in the mill, and no watch was kept, by the custom of the mill, from twelve o'clock Saturday night to twelve o'clock Sunday night. *Held*, that Sunday nights were excluded, both by custom and a fair construction of the whole application. *Ripley v. Aetna Ins. Co.* 29 Barb. N. Y. 552. 1859.

§ 8. In a policy of insurance upon a saw-mill, the assured covenanted "that the representation given in the application for this insurance contains a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured, so far as the same are known to the assured and material to the risk; and that if any material fact or circumstance shall not have been fully represented, the risk hereupon shall cease and determine, and the policy be null and void." The applicant, to a question "Is a watch kept on the premises during the night? Is any other duty required of the watchman than watching for the safety of the premises?" answered, "A good watch kept; men usually at work; watchmen work at the saws;" and answered in the negative this question: "Is the building left alone at any time after the watchman goes off duty in the morning, till he returns to his charge in the evening?" In fact, no watch was ever kept on the premises after twelve o'clock on Saturday night, or at all on Sunday night, other than the workmen sleeping there, who were instructed to and habitually did examine the mill with reference to fires before going to bed; and the fire occurred on Sunday

night, when no one was on the premises. *Held*, that the terms "good watch" must be interpreted to mean "suitable" or "proper watch;" and it was for the jury to decide whether the watch kept was a suitable and proper one, and whether the risk was effected by the watch actually kept, as compared with the one stipulated for. *Parker v. Bridgeport Ins. Co.* 10 Gray, Mass. 302. 1858.

See by-laws and Conditions, § 12. Usage, 12.

WHAT PROPERTY IS COVERED BY POLICY.

§ 1. Policy in favor of a coach-plater and cow-keeper on his "stock in trade, household furniture, linen, wearing apparel, and plate." The fire consumed, among other things, a large stock of linen-drapery goods. *Held*, on the maxim of "*noscitur a sociis*," that the policy intended household linen or apparel, and did not cover the stock of linen goods. *Watchorn v. Langford*, 3 Camp. N. P. 422. 1813.

§ 2. Where one condition of the policy provided that "jewels, plate, medals, or other curiosities, paintings and sculpture, shall not be included in any insurance, unless specified in the policy," and among the items of household furniture, for the loss of which the assured claimed, were included five portraits, with their frames, twelve silver table spoons, twelve tea spoons, and a silver sugar tongs; the court charged the jury, that although "plate and paintings" were not covered by the policy, unless specified, yet he doubted, whether the condition could be applied to the portraits, or silver spoons specified in the assured's schedule. *Moadinger v. Mechanics' Fire Ins. Co.* 2 Hall, N. Y. 490. 1829.

§ 3. Where policy described the property insured as "contained in a frame dwelling house and bake house, front and rear, situated at No. 17 Thomas street;" *Held*, that assured could not recover for the loss of thirty barrels of flour, stored in a shed leading from the bake house to the front house. *Moadinger v. Mechanics' Fire Ins. Co.* 2 Hall, N. Y. 490. 1829.

§ 4. Where policy read as follows: "One thousand dollars on his stock in trade, as a baker," &c.; *Held*, that the words "stock in trade" must have a more extended signification than when applied to the business of a merchant, and that in this case, they covered all the tools and implements necessary for carrying on the business of assured, and therefore included his horse and cart, as well as articles in his house. *Moadinger v. Mechanics' Fire Ins. Co.* 2 Hall, N. Y. 490. 1829.

§ 5. A policy on gasometers, and another on fixtures, "belonging to and rented by the company, placed or to be placed in the buildings, stores, and dwellings of subscribers;" *Held*, to include all gasometers and fixtures erected and made after dates of the policies, as well as those existing and already placed at time policies issued; and although the value of the gasometers and fixtures at time of insurance, was respectively but \$2,000 and \$5,000, and at time of fire had been increased to \$20,000 and \$100,000, assured was yet entitled to recover all loss and damage on any of them, not exceeding amount insured. *New York Gas Light Co. v. Mechanics' Fire Ins. Co.* 2 Hall, N. Y. 108. 1829.

§ 6. "House," embraces everything appurtenant and necessary to the main building. Therefore, where a house is insured, and it evidently appears, from payment of the premium commensurate with the entire value of the whole, that a back building was included in the insurance, it will be considered as accessory to the main building and hence embraced by the policy. *Workman v. Insurance Co.* 2 La. 507. 1830.

§ 7. A policy on "wearing apparel, furniture, and stock of a grocery" will not cover "linen and sheets," smuggled and secretly offered for sale. A watch, being a memorandum article, is not embraced in a policy on "furniture and wearing apparel," unless specially insured. *Clary v. Protection Ins. Co. Wright, Ohio* 227. 1833.

§ 8. Where a policy covered "furniture" generally, in a house which was described, without mentioning that part of it was stored in the garret and but rarely used; it is sufficient to authorize a recovery for the whole loss, as well for that in the garret, as for that in daily use in the main building. *Clark v. Firemen's Ins. Co.* 18 La. 431. 1841.

§ 9. In a policy on a "new bark now being built at Butler's ship yard at Baltimore;" *Held*, that material and other work prepared to be put on it, and lying in the ship yard and in sail lofts therein, were not covered by the policy, until actually built in the bark. *Mason v. Franklin Ins. Co.* 12 Gill & John, Md. 468. 1842.

§ 10. Furniture and movables are chattels, not fixtures, and not covered by a policy on "fixtures." *Holmes v. Charleston Mut. Ins. Co.* 10 Met. Mass. 211. 1845.

§ 11. A policy on an "unfinished house" does not cover wood work prepared for that house, and deposited in an adjoining one, which was also insured. *Ellmaker v. Franklin Fire Ins. Co.* 5 Penn. St. 183. 1847.

§ 12. A ship builder insured "on his stock of timber, including planks, futtocks, knees, locusts, standards and stagings." *Held*, that "locust capstans," partly prepared for the vessels which the insured was building, were covered and protected by the policy. *Webb v. National Fire Ins. Co.* 2 Sandf. N. Y. 497. 1849.

§ 13. In the case of an insurance on a ship builder's

stock of timber, contained in a yard bounded by certain streets and the river; *Held*, that evidence to prove an usage of ship-builders to place their timber on the sides of adjoining streets, as much as in the yard proper, was properly admissible; and if proven, that assured might recover for timber so placed. *Webb v. National Fire Ins. Co.* 2 Sandf. N. Y. 497. 1849.

§ 14. A clause in a policy covering jewelry and clothing, being stock in trade, does not include such articles as musical instruments, surgical instruments, guns, pistols, and books. *Rafael v. Nashville Marine & Fire Ins. Co.* 7 La. An. 244. 1852.

§ 15. A policy of insurance on goods, described them as being "in the store part" of the building. Afterwards they were removed to the second and third stories, and at time of fire were still there, whilst the store part was occupied by other parties. *Held*, that these goods were not within the spirit or letter of the policy. *Boynton v. Clinton & Essex Mut. Ins. Co.* 16 Barb. N. Y. 254. 1853.

§ 16. A policy issued to plaintiffs on a ship in shipyard, was subsequently endorsed as follows: "This insurance is transferred to cover a barque (on the stocks near said ship) building for Howes, Godfrey & Co., with privilege to build another vessel alongside." A fire then occurred, destroying four hundred and sixty-two pieces of timber, which had been prepared and were intended to be put into the barque, and were lying near the barque for that purpose, and were rendered valueless for any other use. The assured made claim for the loss of these sticks of timber. *Held*, that the policy did not cover them, until they became a part of the barque by being fixed to or in it. *Hood v. Manhattan Fire Ins. Co.* 1 Kern. N. Y. 532. 1854. *Reversing*, 2 Duer, N. Y. 191. 1853.

§ 17. The terms, "on their stock of watches, watch trimmings, &c.," *Held*, to include the entire stock of plain-

tiff, including plate, silverware, and the tools of the trade, and such other goods as form part of similar stocks in Boston, all being covered by the comprehensive, "&c." *Crosby v. Franklin Ins. Co.* 5 Gray, Mass. 504. 1855.

§ 18. Policy on English, American, and West India goods, does not cover tea and nutmegs, they being neither. *Huckins v. People's Mut. Ins. Co.* 11 Fost. N. H. 238. 1855.

§ 19. A policy of insurance upon a "steam saw-mill," does not mean merely the building itself, but includes the whole machinery necessary to make it a steam saw-mill in all its parts. *Bigler v. New York Central Ins. Co.* 20 Barb. N. Y. 635. 1855.

§ 20. The property insured was described in the policy as "their road furniture, consisting of locomotive engines, cars of all descriptions, and snow ploughs, on the line of their road, and in actual use, but not in machine or repair shops." The road insured was the Fitchburg road and its Charlestown branch, and the branch road was in the habit of carrying ice to the wharf, passing its cars over a "spur" railroad, which did not belong to the road insured but to private individuals. On such an occasion, when the cars had remained over night on the "spur" to discharge into an ice house, the latter caught fire, which being communicated to the cars, destroyed them. *Held*, that it being in the usual course of the business of the assured to use their cars in this manner, the entire line became by adoption, to all practical purposes, their line of road, and the cars were in actual use upon "the line of their road" at the time of the loss by fire, and the road might recover for the loss of them. *Fitchburg Railroad Co. v. Charlestown Mut. Ins. Co.* 7 Gray, Mass. 64. 1856.

§ 21. The words, "starch manufactory," in a description in an insurance policy, will include fixtures, &c., necessary to the process. *Peoria Marine & Fire Ins. Co. v. Lewis*, 18 Ill. 553. 1857.

§ 22. In the application and policy, the property insured was described as "a brick dwelling house and wood house," situate, &c., and "occupied for the usual purposes, by a tenant." It appeared that the "wood house" was built at one time, had but one frame, was all under one roof, and was designed for one building, a wood house and carriage house; the wood room constituted two-thirds or more of the entire building, and was separated from the carriage room by a loose partition, about seven feet high, which extended to the eaves on one side and not so high on the other side, leaving a distance of about seven feet between the top of the partition and the ridge pole. The company set up in defense a false representation on the part of the assured, in stating there was no other building within four rods of the premises insured, claiming that the carriage house, part of the wood house, was a separate building which should have been mentioned; *Held*, that the "wood house" covered and included the carriage house and evidence that the whole structure was called by the tenants and neighbors the "wood house" was admissible. *White v. Mutual Fire Ins. Co.* 8 Gray, Mass. 566. 1857.

§ 23. The policy insured the plaintiffs to the amount of \$3,000; "on their three and half story brick building, slate roof, coped, occupied as a patent cordage manufactory, situate No. West Corner of First and South Eight streets, Williamsburg, L. I., \$1,000; on their main shafting and fixtures contained therein, \$1,000; on their lignum vitæ in the cellar of said building, \$1,000." At time of effecting the insurance, and at time of the loss, the plaintiffs were the owners of two brick buildings on the opposite corners of South Eighth and First streets, one of which was occupied as a patent cordage factory, and contained main shafting and fixtures, with a cellar underneath which was used by the plaintiffs for storing large quantities of lignum vitæ. The other building was occupied as a block factory, and not as a cordage factory, with what is called a basement under it, and no cellar. Both buildings

were on the westerly corners of South Eighth and First streets, the block factory being on the north-westerly and the cordage factory on south-westerly corner. The building on the south-westerly corner was destroyed by fire, and assured brought suit to recover for the loss, whilst defendants claimed that the policy covered the building on the north-west corner, and not that on the south-west corner. *Held*, that the policy was plain enough; but an ambiguity arose in consequence of the extrinsic fact that there were two buildings on the west corners of First and South Eighth streets, of the same height, and alike, except the cellar, belonging to the plaintiffs; that this was a latent ambiguity raised by extrinsic evidence and that plaintiffs might introduce evidence to show which was the building intended to be insured; that even supposing the abbreviation "No." meant north, the remainder of the description as to occupancy would be inaccurate as applied to that building, but entirely correct as applied to the building on the south-west corner, and as, notwithstanding the mistake, the intent was clear that the building on the south-west corner was the one intended to be insured, the mistake must be disregarded, even at law, without recourse to equity for correction, *Burr v. Broadway Ins. Co.* 16 N. Y. 267. 1857.

§ 24. Three policies covered merchandise and fixtures, contained in a certain building, designated in the policy. Subsequently another policy was obtained of defendants upon a stock of merchandise "in the chambers" of the same building. The goods in the chambers were destroyed by fire. *Held*, that, it being proved that goods in the chambers were not intended to be included in the first policies, the defendants were liable for the whole loss. *Storer v. Elliot Fire Ins. Co.* 45 Me. 175. 1858.

§ 25. Hawes & Stanley effected an insurance with defendants to the amount of \$1500, as follows, to wit: on stock, \$150; on tools, flasks, machinery, fixtures and cupola, \$750; on patterns and steam engine, \$600, con-

tained in their "furnace" building "on Eddy street, Providence, southerly side," and in their application for this policy, being No. 281, represented the value of their stock to be \$400; of their tools, flasks, &c., to be \$2,500; and of their patterns and steam engine to be \$2,000. At the expiration of this policy the same firm applied for a renewal, with request to defendants to "let the policy read, \$150, on stock, raw, wrought, and in process; \$750, on tools and flasks; \$600, on fixtures, cupola, and patterns; situate in rear of 82 and 84 Eddy street, Providence."

In answer to the question in application for this policy, "Have any alterations been made in or about the property insured, since your last application, materially affecting the risk? If so, state what;" the reply was: "Boiler and steam engine have been removed." The policy numbered 412 was then issued, conforming in all respects, as to amounts insured, and situation of the property, to the request of assured. Upon the expiration of this second policy, a third policy, numbered 619, the one in suit, was issued, in all respects like the preceding one, 412, except that 619 was issued in name of the "Eddy Street Iron Foundry, of Providence," the firm of Hawes & Stanley having been incorporated by that name. The by-laws of the company limited them to insurances of three-fourths the value of the property, and the printed rules of the company, appended to the policy, stated as amongst the "matters which will vacate a policy," "or if there shall be an enlargement, alteration, or addition to the premises, of a character increasing the risk,"—"or, if the state of things in or about the buildings insured be so altered or changed, by the advice, consent or procurement of the insured, as to cause a material increase of risk"—as well as unfair representations or concealment of facts material to the risk. A loss occurred, destroying property in a storehouse on the premises of assured in the rear of 82 Eddy street, and not in the furnace building; the property, consisting of flasks and patterns, being stored for use. *Held*, first, that the policy was not confined in its protection to the "furnace building" only, but by the second

policy was made to include all the property of the assured on their premises in the rear of 82 and 84 Eddy street, whether in storehouse, furnace building or outside; second, that the jury having found that this location of the property did not materially increase the risk, and the change or alteration not being in the property itself, but in the policy, extended so as to embrace the entire property in its existing situation, there had been no violation of the by-laws above mentioned; third, that the amounts insured on different subjects, having been differently apportioned in the second policy, of which the one in suit was a renewal, the statement of values given in the application for the first policy, No. 281, could not be adduced as evidence against them, of the value of the property insured, either at the date of the last policy, or at the time of the loss, and that there was, therefore, no misrepresentation, in respect to such value, on the part of the assured. *Eddy Street Iron Foundry v. Farmers' Mut. Ins. Co.* 5 R. I. 426. 1858.

§ 26. On a policy of insurance, covering a stock of goods in a corner store, was this endorsement: "The communication made in the adjoining stores, does not prejudice this insurance." The assured had made a communication between the two stores, and occupied both. A loss having occurred, and claim made for the loss of goods in both stores; *Held*, that this endorsement did not of itself extend the insurance over the goods in the adjoining store, and as there was nothing in the language of the policy itself, which necessarily embraced the stock in such adjoining store, parol evidence, of what was said at time of application for the privilege of such communication, ^{LV} scope, and force of a written contract, and, in effect, to incorporate a new provision into it. *Liddle v. Market Fire Ins. Co.* 4. Bosw. N. Y. 179. 1859.

§ 27. A description in an application for insurance of a building as used "for the manufacture of lead pipe," or "of lead pipe only," includes the manufacture of wooden

reels on which to coil the lead pipe, if essential to the reasonable and proper carrying on of the business of manufacturing lead pipe. *Collins v. Charlestown Mut. Fire Ins. Co.* 10 Gray. Mass. 155. 1857.

§ 28. A policy of insurance on goods in "the brick building situated on Main street in C., known as D. & Co.'s car factory," covers goods in a building erected as a wing against the rear wall of D. & Co.'s car factory on Main street, with an opening through the wall of less than three feet square, usually closed by an iron door, if both wing and main building are used for manufacturing cars and are known as "D. & Co.'s car factory." *Blake v. Exchange Mut. Ins. Co.* 12 Gray, Mass. 265. 1858.

§ 29. A policy of insurance on "stock in trade, being mostly chamber furniture in sets, and other articles usually kept by furniture dealers," based on an application which is made part of the contract, for insurance on "household furniture, being my stock in trade, mostly chamber furniture in sets," covers paints and varnish used to finish the furniture, if usually kept by furniture dealers. And this notwithstanding the assured, to a question in the application as to whether any highly inflammable matter was kept in or near the premises, answered: "Not to my knowledge." *Haley v. Dorchester Mut. Fire Ins. Co.* 12 Gray, Mass. 545. 1859.

§ 30. Under an ordinary policy the interest of a husband in property conveyed to his wife, would be covered by an insurance of the policy as his; and if no inquiry be made an omission to state the nature and extent of his interest, will not avoid the policy. *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26. 1861.

§ 31. A firm took out a policy of insurance upon merchandise contained in a "new frame barn, wagon and ware room," situated on an alley and occupied for a warehouse, and subsequently assigned their interest in the pol-

icy and property insured to others, who erected a brick addition of their store-room (which was built upon the front of the lot on the rear of which the frame barn was erected), extending it back to the alley, and requiring the removal of part of the barn; afterwards, the new building and the remnant of the frame barn, with their contents were destroyed by fire. In an action against the insurance company for the insurance upon the goods in the remnant of the barn and in the brick extension, *Held*, that no recovery could be had under the policy, for any loss of goods in the new brick building or extension of storeroom, and if at all, only for those in the remnant of the frame barn and wareroom as originally erected and used. *Lycoming County Ins. Co. v. Updegraff*, 40 Penn. St. 311. 1861.

§ 32. If one partner insure the partnership property against loss by fire in his own name only, and it does not appear that the insurance was really intended for the benefit of the firm, the premium paid from the partnership funds, and the transaction subsequently ratified by the other partners, the policy will cover only the undivided interest of the partner insuring. *Peoria Marine & Fire Ins. Co. v. Hall*, 12 Mich. 202. 1864.

§ 33. An open policy of insurance upon merchandise will not cover articles kept wholly or partially for use in and about a building, but only articles kept for sale; but an open policy upon "property" contained in specific buildings will cover articles kept for use as well as those kept for sale. *Burgoss v. Alliance Ins. Co.* 10 Allen, Mass. 221. 1865.

§ 34. A policy of insurance against fire purporting to cover "merchandise hazardous, not hazardous, and extra-hazardous, their own or held by them in trust or on commission or joint account, &c., in all or any of the brick or stone warehouses, and while in transitu, or on any of the streets, yards or wharves in the cities of New York, Brook-

lyn or Jersey City, and unless under the protection of a marine policy, subject to average clause annexed." To this policy was annexed this provision: "It is at the same time agreed that if any specific parcel of goods included in the terms of this policy, or such goods in any specified building or buildings, place or places, within the limits of this insurance, shall, at the time of any fire, be insured in this or any other office, this policy shall not extend to cover the same, excepting only so far as relates to any excess of value beyond the amount of such specific insurance or insurances, which said excess is declared to be under the protection of this policy and subject to average as aforesaid." A fire occurred at one of the places where the insured had merchandise to the value of \$386,026. They had a specific insurance on the goods in that store to \$324,000. The loss and damage occasioned by the fire was \$274,192. In an action upon the policy to recover of the insurers *pro rata* amount of the loss in proportion to the amount insured; *Held*, that the true interpretation of the policy was, that if a loss occurred, and the specific insurance exceeded the loss, the party insured was protected thereby, and had no claim under the general policy; that if the specific insurance fell short of the loss, the insured might recover on the general policy, for such excess; that the fact that the whole loss was covered by, and to be paid by the specific insurance, established a defense under the policy and no loss was chargeable thereon. *Fairchild v. Liverpool & London Fire Ins. Co.* 48 Barb. N. Y. 420. 1867.

See Description of Property, § 14, 17. Construction, 13. Encumbrance, 7. General Average, 1. Gunpowder 1. Interest in Policy, 26, 27. Parol Evidence, 5, 6. Renewal of Policy, 2, 5. Risk, 13, 33, 34.

WHO MAY SUE.

§ 1. In case of assignment of policy and of property insured, under provision of act of incorporation, the action should be brought in name of the assignee. And when declaration was in joint names of both assignor and assignee; *Held*, that the plea, setting up the assignment from one to the other, was a good plea in bar, and perhaps would be good in abatement. *Ferris v. North American Fire Ins. Co.* 1 Hill, N. Y. 71. 1841.

§ 2. Assignee cannot recover in an action, in his own name, on the original contract, although the company consent to the assignment, unless there is a stipulation in the policy to that effect. *Jessel v. Williamsburg Ins. Co.* 3 Hill, N. Y. 88. 1842.

§ 3. Where the charter of a mutual insurance company provided that upon the alienation of any property insured, the alienee might have the policy confirmed and ratified to him, and upon the performance of certain conditions should have all the rights and privileges of the original insured; *Held*, that after compliance with the requirements of the charter by the alienee and assignee, an action on the policy might be maintained by the assignee in his own name, but not in the name of the assignor. *Mann v. Herkimer County Mut. Ins. Co.* 4 Hill, N. Y. 187. 1843.

§ 4. The charter of a mutual insurance company gave to the purchaser of the property insured the same rights and privileges as the original insured possessed, provided the policy should be assigned to the purchaser, and ratified and confirmed to him in compliance with the requirements of the charter. *B. insured in such company \$600, on*

dwelling ; \$600 on store building, and \$1,400 on goods in the store building, and subsequently entered into partnership with C., as to the goods in store—upon being notified of which the company gave a written consent that the policy should remain good to the extent of \$1,200, to B., and \$1,400 to B. and C., and made an entry in their books, recognizing C. as a member of the company, but the policy itself, or no part thereof, was ever assigned to C. In an action in equity, upon the policy for a loss, in the name of B. and C. ; *Held*, that no action in law could be maintained either by B. or C., or by them jointly, for the loss of joint property, but the consent of the company created an obligation on the part of the company, which was exclusively the subject of equitable cognizance, and therefore the proper and indeed the only form of relief to the assured, and the action was rightfully prosecuted in such court. *Bodle v. Chenango County Mut. Ins. Co.* 1 Comst. N. Y. 53. 1849.

§ 5. In a fire policy the insurers, by an endorsement thereon, consented that the loss should be payable to W. ; *Held*, sufficient in a declaration for covenant on the policy, to allege that the loss was not paid to the plaintiff or to W. ; and that as such endorsement gave W. no legal interest in the property, it did not preclude the assured from maintaining an action in his own name ; nor was it necessary to aver any order from W. in favor of the assured. *Ketchum v. Protection Ins. Co.* 1 Allen, N. B. 136. 1848.

§ 6. Where mortgage has been made on property insured after insurance, and policy assigned to the mortgagee with the consent of the company, action on the policy must be brought in the name of the original insured. But if the property has been absolutely sold, and policy assigned to purchaser in compliance with the requirements of a section of defendant's charter, giving to the assignee all the rights and privileges of the original insured, then the action must be in name of the assignee. *Conover v. Mutual Ins. Co.* 3 Denio, N. Y. 254. 1846. Affirmed, 1 Comst. N. Y. 290. 1848.

§ 7. Where lessees of mortgaged premises, and also heirs of mortgagor (a covenant being in the lease "to keep the premises insured,") obtained a policy on the property, and had it "made payable in case of loss to the mortgagee;" *Held*, that the mortgagee could maintain action in his own name, and recover amount of the loss, not exceeding his mortgage, although the property after the fire was sufficient to secure the mortgage debt. *Motley v. Manufacturers' Ins. Co.* 29 Me. 337. 1849.

§ 8. Party had sold the premises insured and assigned the policy, with the consent of the insurer to the purchaser, and taken back a mortgage on same property, and had the policy re-assigned to himself, for security, with the consent of the insurers; *Held*, that he could maintain action on it in his own name. *Kingsey v. New England Mut. Ins. Co.* 8 Cush. Mass. 393. 1851.

§ 9. Where policy has been assigned as security, with the consent of the company, the assignee may sue on the policy in his own name. *Philips v. Merrimack Mut. Fire Ins. Co.* 10 Cush. Mass. 350. 1852.

§ 10. Where a by-law of a mutual company gave all the rights of membership to an assignee of a policy, who might have had it confirmed to him with consent of the company, as also the right to maintain action in his own name; yet, if there be no conveyance or assignment of the property insured also, such action cannot be maintained in name of assignee. *Rollins v. Columbia Fire Ins. Co.* 5 Fost. N. H. 200. 1852.

§ 11. Where the agent of a manufacturing company applied for insurance on the building and machinery belonging to the company, and the insurers issued a policy to him as agent on the property of the Lisbon Manufacturing Co.; *Held*, that in case of loss, suit might be maintained by the agent in his own name for the recovery of the whole loss, the members of the company consenting,

though the agent was but partially interested. *Goodall v. New England Fire Ins. Co.* 5 Fost. N. H. 169. 1852.

§ 12. When "payable in case of loss to" the action to recover for loss, must be brought in name of the party to the policy who gives the premium note and thereby becomes a member of the company. *Nevins v. Rockingham Mut. Ins. Co.* 5 Fost. N. H. 22. 1852.

§ 13. A policy was issued to B., without any general words, such as "for the benefit of whom it may concern," or "as the property may appear." In an action on the policy by B. and L., the complaint averred an insurance to both, on a joint interest and a joint loss. The proof showed a joint loss, but an insurance to B. alone; *Held*, a fatal variance. *Burgher v. Columbian Ins. Co.* 17 Barb. N. Y. 274. 1853.

§ 14. Policy issued to plaintiff for \$1,200 as follows, to-wit: \$750 on his dwelling house; \$350 on his barn; and \$100 on his furniture; was made payable in case of loss to Susan Latham, mortgagee, to the amount of \$400. The barn was destroyed, and plaintiff brought suit on the policy in his own name; *Held*, that if such suit was brought with the knowledge and assent of the mortgagee, it might be maintained, and if such assent was given before the commencement of the action, the plaintiff was entitled to recover his costs, but otherwise, if such assent was not given until after the commencement of the action. *Jackson v. Farmers' Mut. Fire Ins. Co.* 5 Gray, Mass. 52. 1852.

• • § 15. Where party insured his goods in a mutual company, and mortgaged same, assigning policy with consent of the company, to mortgagee, as collateral security; *Held*, that in the absence of any provision in the charter or by-laws, whereby the assignee becomes a member of the company, the action in case of loss must be in the name of the assured, with whom the contract was made. *Folsom*

v. Belknap County Mut. Fire Ins. Co. 10 Fost. N. H. 231. 1855.

§ 16. Insured assigned his policy to P., as collateral security, and P., with consent of the company assigned it to R., also as collateral security; but neither of the assignees had any interest in, or lien upon the property insured. Action was brought in the names of assignor and assignee. *Held*, that the assignment of the policy would not enable assignee to maintain an action in case of loss; but the assignor, alone, might recover on it to the extent of the loss. *Peabody v. Washington County Mut. Ins. Co.* 20 Barb. N. Y. 339. 1855.

§ 17. Where policy provided that, upon alienation of the property insured by mortgage or otherwise, the mortgagee might have the policy assigned and confirmed to him, subject to all the liabilities, rights and privileges of the original insured, and mortgagor, whose dwelling-house was insured for \$1,000, assigned his policy, with the consent of the company, to the mortgagee of the dwelling-house, who paid the premiums thereafter for the renewals of the same; *Held*, that the assignment with consent of the company, and payment of the premium by the mortgagee, was a new parol agreement, made between company and assignee, and upon which the assignee might maintain action in his own name. *Flannagan v. Camden Mut. Ins. Co.* 1 Dutch, N. J. 506. 1856.

§ 18. Where an insurance company issued a policy to G., on property of his, he giving a premium note to pay such assessments as should be made against the policy, but the insurance "made payable in case of loss to B.;" *Held*, that the action should be brought in the name of G., he being a member of the company. *Blanchard v. Atlantic Mut. Fire Ins. Co.* 33 N. H. 9. 1856.

§ 19. Insurance brokers, holding an open policy for themselves and "whom it may concern," may maintain

action in their own name for use of the owners, although the latter are not named in the policy, if it sufficiently appear that the insurance was procured for their benefit. *Protection Ins. Co. v. Wilson*, 6 Ohio St. 553. 1856.

§ 20. An order "to pay the within, in case of loss," to a certain party named, endorsed on a policy of insurance, and assented to by the company, will enable such party, (if he have an interest in the property, and, if the company is liable to pay the loss to any one,) to recover in his own name upon a proper count upon the express promise of the company to pay the loss to him. *Barrett v. Union Mut. Fire Ins. Co.* 7 Cush. Mass. 175. 1851. *Lowell v. Middlesex Mut. Fire Ins. Co.* 8 Cush. Mass. 127. 1851. *Loring v. Manufacturers' Ins. Co.* 8 Gray, Mass. 28. 1857.

§ 21. An assignee of a policy of insurance cannot sue on it in his own name, although the company agree thereby to indemnify the assured and his assigns. *Beemer v. Anchor Ins. Co.* 16 Upper Canada, Q. B. 485. 1858.

§ 22. Vendee of property insured by the vendor, the policy being assigned by him to the vendee, may maintain an action on the policy for a loss, although the sale may appear to have been made with the intent to defraud the creditors of the vendor. *Crafts v. Union Mut. Fire Ins. Co.* 36 N. H. 44. 1858.

§ 23. The insertion in the policy of the words, "loss if any, payable to E. B. G., mortgagee," operates to give the mortgagee the same rights, and interest in the policy which he would have, if, without such words in the body of the policy, the mortgagor had assigned the policy to E. B. G. with the express assent of the company. In an action on such policy, there being no averment that E. B. G., the mortgagee had been paid; *Held*, that the mortgagor alone could not recover the amount of the loss, so long as the mortgagee remains unpaid; and that the payment by the company to the mortgagor, without the as-

sent of the mortgagee would not discharge the liability of the company to the mortgagee, and that mortgagee, therefore, so long as the mortgage remained unsatisfied was a necessary party to the action. *Ennis v. Harmony Fire Ins. Co.* 3 Bosw. N. Y. 516. 1858.

§ 24. When a mortgagor takes a policy of insurance in his own name, with the clause, "loss if any payable to A. B., mortgagee;" A. B. only in such a case (the mortgage being unsatisfied) can maintain an action for the insurance; the mortgagor cannot assign the claim to another, so that the assignee can sustain an action upon a loss under the policy. *Ripley v. Aetna Ins. Co.* 29 Barb. N. Y. 552. 1859.

§ 25. Where a policy is issued to two persons jointly, both should join in bringing an action for a breach of the contract, and the omission to join them is a good defense, either in abatement, or under the general issue. If the one partner has assigned all his interest in the policy to the other, still he must proceed in the name of the original parties, unless he can show notice of the assignment to the company, and of their assent thereto. *Tate v. Citizens' Mut. Fire Ins. Co.* 13 Gray, Mass. 79. 1859.

§ 26. Where a policy of insurance is assigned as collateral security, the action must be brought in name of original insured, unless, by the assignment and the assent of the company agreeably to their charter and by-laws, the assignee becomes substituted as the member of the company. *Shepard v. Union Mut. Fire Ins. Co.* 38 N. H. 232. 1859.

§ 27. Wood & Johnson were partners. By their articles of partnership Wood had the right upon the dissolution of the firm, to take the goods, pay Johnson for them and carry on the business. On the 13th of August, 1851, defendants insured them for six years, upon grain, and goods that might be in their store during that time. The

agreement as to Wood's right to buy the goods and continue the business, was not stated in the application or made known to the defendants. In 1852, Johnson died, and thereupon, Wood bought all Johnson's interest in the goods, carried on the business in his own name, and thereafter bought goods on his own account. At time of Johnson's death, Wood informed the agent of the defendant, of the change, and desired to know if anything was necessary to be done, in order to make the policy valid, and available to himself, during the remainder of the time for which it was issued, upon goods that might be purchased thereafter by himself. The agent said no change was necessary and agreed that the policy should apply as requested, and afterwards the directors, with notice of Johnson's death, and that plaintiff was continuing business on his own account, assented to this understanding and agreement, treated the policy as valid and subsisting, and levied and collected assessments on it, until time of fire. The policy contained no clause against alienation of goods insured, though it had such a provision with reference to "buildings." *Held*, 1st, that after the change of partnership and sale of the goods to Wood, the contract was at an end, and Wood could not recover for goods subsequently purchased, (though as survivor of the firm he might recover for the amount of goods belonging to the old firm), unless the defendants had agreed or assented to treat the policy as a policy to Wood alone; 2d, that in the absence of any provision in the charter, directing how an alienee of goods might have the policy confirmed to him, parol evidence of what was said to and by the agent, and of the company's assent thereto, was admissible, as tending to prove an express promise made to Wood, that the policy should continue valid for the protection of his interest; 3d, that the company having treated the agreement between Wood and their agent as valid, and acted on it for more than two years and up to the time of the loss, such conduct was a sufficient ratification of the agreement, although no direct and express language of affirmation was shown. *Wood v. Rutland & Addison Mut. Fire Ins. Co.* 31 Vt. 552. 1859.

§ 28. A policy was issued to Lewis Beach in 1847, "Loss, if any, payable to Brevoort and Odell." In 1851, assured died intestate, seized in fee of all the property insured by said policy, leaving him surviving, his widow, the plaintiff, and six children, his only heirs at law, all of whom were still living. On the 26th of August, 1851, the plaintiff was duly appointed his administratrix, and she continued to pay the premiums on the renewal of the policy, still in the name of L. Beach, "Loss, if any payable to B. and O.," down to July 9, 1856. On the 1st of June, 1857, one of the buildings insured was totally destroyed by fire, and the actual loss sustained exceeded the amount insured. On the 14th of August, 1857, the mortgage to Brevoort and Odell was paid in full, and from that time they or either of them had no interest in the policy. After payment to mortgagees, the administratrix commenced suit in her own name on the policy; *Held*, 1st, that Brevoort and Odell having received full payment of the mortgage, to secure the payment of which the policy was assigned to them, an action on the policy need not be brought in their names; 2d, that had a loss occurred between the time of the death of Lewis Beach and the 24th of July next thereafter, an action might have lain in the name of plaintiff, as administratrix, upon the policy; but the suit (B. and O.'s claim being fully satisfied) would have been for the benefit of those to whom the property had descended, and she would have held any money she might have recovered, not as assets, but as their trustee; 3d, that at time of renewal on 9th of July, 1851, and at time of each subsequent renewal of the policy, and at time of the loss, the plaintiff, as administratrix, had no interest in the property insured; 4th, that the payment by her of the premiums, and taking the renewal receipts, no more entitled her to sue as administratrix, to recover for the loss in question, than similar payments by an entire stranger to all parties, and to the property itself, would entitle such stranger, in case of a loss, to sue in his own name; 5th, that upon the facts proved, the present plaintiff had no right of action, and defendants were entitled

to judgment, dismissing plaintiff's complaint. *Beach v. Bowery Fire Ins. Co.* 8 Abbott's P. R. N. Y. 261—note. 1859.

§ 29. Where a policy of insurance against fire, issued by a mutual company, has been assigned, the assignment ratified by the company, and a new premium note given, and the assignee, by the terms of the charter or by-laws thereby becomes a member of the company, he may, in case of loss, maintain an action on the policy in his own name. *Stimpson v. Monmouth Mut. Fire Ins. Co.* 47 Me. 379. 1860.

§ 30. Under the New York Statute of 1849, "to extend the remedies at law against foreign insurance companies," which provides that suits may be brought against such companies upon any contract made or delivered in that State, an action lies upon a policy issued and delivered there, by a resident agent of a foreign company, to a non-resident plaintiff. *Burns v. Provincial Ins. Co.* 35 Barb. N. Y. 525. 1861.

§ 31. An agent, by whom an insurance is obtained in his own name for the benefit of another, may maintain an action upon it. *Barnes v. Mut. Fire Ins. Co.* 45 N. H. 21. 1863.

§ 32. By the assent of the directors of a mutual insurance company, to an assignment of a policy to a mortgagee of the property, the assignee becomes a member of the company, and may sue in his own name upon the policy in case of loss, where the by-laws allow such assent to be given. *Barnes v. Union Mut. Fire Ins. Co.* 45 N. H. 21. 1863.

§ 33. An assignee of an insurance policy cannot maintain a suit thereon in his own name, unless it is so authorized by the act incorporating the insurance company, or by the general law. At common law, an action in the name of

the assignee could not be maintained. *New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221. 1863.

§ 34. Whether an action on a policy of insurance may be maintained by an assignee of the policy, in his own name, where it has been assigned with consent of the company, and premium note of assignee has been received and substituted in place of that of assignor: Query? *Lycoming County Mut. Ins. Co. v. Schreffler*, 44 Penn. St. 269. 1863.

§ 35. Where in a policy of insurance, the loss is made payable to a third person who has no interest in the property insured, but claims the insurance as collateral security for liabilities incurred for the insured, prior to the insurance, he can, in case of loss, maintain an action for the insurance money, and recover in his own name. *Frink v. Hampden Ins. Co.* 31 How. N. Y. 30. 1865.

§ 36. Upon a policy of insurance against fire, issued to A. loss, if any, payable to B., the latter may maintain an action in his own name. *Frink v. Hampden Ins. Co.* 1 Abb. Pr. N. S. N. Y. 343. 1865.

§ 37. An insurance, in the name of a person as executor, inures to the benefit of the estate which he represents, and the insurance money belongs to the estate, and can be sued for and recovered by the residuary legatees. *Colburn v. Lansing*, 46 Barb. N. Y. 37. 1866.

See Alienation, § 11, 16, 26, 32, 48, 49. Assignment, 17, 24. By-Laws and Conditions, 8. Damages, 28. Endorsements, 4. Garnishment or Trustee Process, 5. Insurable Interest, 31, 39. Interest in Policy, 20, 30, 43, 44. Mutual Companies and Members of, 12. Other Insurance, 4, 54. Parol Evidence, 3. Pleading and Practice, 5, 53. Premium Notes, 30. Renewal of Policy, 11. Subrogation, 16, 14. Title, 28. Written Portion of Policy, 2.

WRITTEN PORTION OF POLICY.

§ 1. The insurance was "against loss or damage by fire" on "buildings occupied as a china factory, and on stock finished and unfinished therein." Among the printed conditions to which the policy was made subject, it was stipulated "that if the premises should be appropriated, applied or used to or for the purpose of carrying on therein any of the trades, vocations, or business, denominated hazardous, extra-hazardous, or enumerated in the memorandum of special rates, then and so long, &c., the policy should cease and be of no further effect." In the list of extra-hazardous trades and occupations were included "carpenters in their shops, and houses building or repairing." In connection with the insured establishment a carpenter was regularly employed, and worked in the buildings with bench and tools in making shelves, mouldings and racks, It appearing that it was usual to keep a carpenter, thus employed, in all similar establishments; *Held*, that the express written agreement of the company to insure a "china manufactory," necessarily authorized the exercise of those trades and avocations in the buildings insured, which appertained to the establishment; and the printed clause must be restricted in its operation to other trades than those required and necessary to the proper conducting of the business of a "china manufactory." Also *Held*, by Oakley, J., that the carpenter thus employed was not "carpenters in their shops," within meaning of the prohibition. *De Longuemare v. Tradesmen's Ins. Co.* 2 Hall, N. Y. 589. 1829.

§ 2. Where a policy insured "H. & D. Cotheal, or whom it may concern, loss, if any, payable to them;" *Held*,

that these words, being written, controlled any printed portions in conflict with them; and that these special terms of the policy authorized the action to be brought in their names, whether they were the beneficial owners of the property or not. *Jefferson Ins. Co. v. Cotheal*, 7 Wend. N. Y. 72. 1831.

§ 3. Where policy insured parties against loss or damage by fire on their "stock as rope manufacturers," contained in a brick building; *Held*, that it sanctioned the insured in using their stock as rope manufacturers in that building; and one of those uses would be the manufacture of ropes; and that it would permit there the business of a "rope maker," although that was enumerated, among the specially hazardous classes of business in the policy. But even if the written words did not permit the business of a "rope maker," the "hackling hemp and spinning it" is not "rope making," and, not being prohibited in classes of hazards, was allowable. *Wall v. Howard Ins. Co.* 14 Barb. N. Y. 383. 1852.

§ 4. This policy covered the same stock with same privilege, as in 17 N. Y. 194, *Harper v. Albany Mutual Ins. Co.* Section 6 *post*, but condition with reference to camphene read as follows: "This company will not be liable for a loss by fire occasioned by camphene or other inflammable liquid." The circumstances and origin of the fire were also the same. *Held*, that in the privilege granted of carrying on a "printing business," was properly included all that was necessary, and essential in conducting such a business; and, as camphene was a necessary and customary article in the printing business, insurers were liable for a loss occasioned by it in course of legitimate use, notwithstanding the printed exception. But, if used for any other purpose than such as was necessary and incidental to the "printing business," then the printed exception became operative. *Harper v. City Ins. Co.* 1 Bosw. N. Y. 520. 1857. Affirmed, 22 N. Y. 441. 1860.

§ 5. The defendants insured the plaintiff on his stock in trade "as a manufacturer of brass clock works;" *Held*, that this was a license to him to use all such articles as are ordinarily employed in that manufacture, and to keep them on hand and even to make them for that purpose, if it be the ordinary course of that trade to make them; although the use or keeping of such articles be prohibited by the printed terms of the policy, as extra hazardous. *Bryant v. Poughkeepsie Mut. Ins. Co.* 17 N. Y. 200. 1858. *Same v. Same*, 21 Barb. N. Y. 154. 1855.

§ 6. The written portion of policy read as follows: "on their printing and book materials, stock, paper and stereotype plates and printed books contained, &c., and privileged for a printing office, bindery and bookstore." Among the printed conditions, "camphene on sale," was included in class of extra-hazardous articles, for which special rates were to be charged; then, under this head followed, "camphene, spirit gas or burning fluid cannot be used in the building where insurance is effected, unless permission for such use be endorsed in writing on the policy, and is then to be charged an extra premium." It appeared that camphene was ordinarily used by printers for the purpose of cleaning their type and plates, and was so used by the plaintiff, and that the fire was occasioned by accidentally dropping a match into a pan of camphene about to be used. *Held*, 1st, that the prohibition of camphene, above referred to, related only to its use as a lighting material; and 2d, that it being a necessary incident to the printing business, was included and embraced in the general word "stock," and was as plainly within the risks assumed by the company, as if written in the policy at length. *Harper v. Albany Mut. Ins. Co.* 17 N. Y. 194. 1858.

§ 7. Policy was issued on assured's stock of goods in his shop in Meredith, N. H., "under the provisions, conditions and limitations of the charter and by-laws of the said company." The policy prohibited the keeping of

"cotton or woolen waste, or oily rags" about the building insured. The application stated at the head, "no buildings will be insured by this company where cotton waste is kept." The application was made a part of the contract, and contained the following questions and answers: 8. "Is cotton or woolen waste or rags kept in or near the property to be insured?" Answer, "None." 9. "Of what does the stock in trade, on which insurance is desired, consist?" Answer, "All of goods usually kept in a country store." In an action on the policy, it appearing that assured had kept clean white rags as a part of his stock; *Held*, that it was competent for the assured to show that clean white rags commonly formed part of the stock of country stores, and that in this respect he had complied with the statement made in answer to the ninth interrogatory, by which his stock was described as being that which was usually kept in a country store. *Elliott v. Hamilton Mut. Ins. Co.* 13 Gray, Mass. 139. 1859.

§ 8. Where the printed condition of a policy excepted losses "caused by or consequent upon the bursting or collapsing of a steam-boiler or steam-pump," but the written portion insured the steam-engine; and the fire by which the insured property was destroyed, was caused by an explosion of the steam-boiler; *Held*, that there was a repugnancy between the written and printed portions of the policy, and that the written portions must prevail. *Hayward v. Northwestern Ins. Co.* 19 Abb. Pr. N. Y. 116, 1864.

§ 9. Where there is any repugnancy between the printed and written conditions of a policy, the written conditions must prevail. This rule applied to excuse want of notice of additional insurance as required by the printed conditions of the policy, where the insurer had written across its face "privilege for \$4,500 additional insurance." *Benedict v. Ocean Ins. Co.* 31 N. Y. 389. 1865.

§ 10. Where a policy contains written and printed stipulations which are inconsistent with each other, the written clauses must control. *Goss v. Citizens Ins. Co.* 18 La. An. 97. 1866.

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